# (26,586)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1918.**

# No. 500.

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THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 27, 1918.

1 I. *Petition. Filed April* 6, 1914.

In the Court of Claims of the United States, General Jurisdiction.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

vs.

THE UNITED STATES.

*Petition.*

(Filed April 6, 1914.)

To the Honorable the Chief Justice and Judges of the Court of Claims:

I.

Petitioner, The New York Central and Hudson River Railroad Company, is a corporation incorporated and organized under the laws of the State of New York, and as such corporation maintains and operates, and during all of the times hereinafter mentioned did maintain and operate, as a common carrier of passengers and
2 freight certain lines of railway in or through various States of the United States, each and every of which line of railway by virtue of the provisions of section 3964 of the Revised Statutes of the United States constituted a duly established "post road," over and along which the Postmaster General of the United States was and is authorized by virtue of the provisions of section 3965 of the Revised Statutes of the United States to provide for the carriage of the mails "as often as he, having due regard to productiveness and other circumstances," may think proper.

II.

In the construction of its said railway lines, or any of them, petitioner was not aided by any grant of lands or other property of value made to it by the United States.

III.

By virtue of the above circumstances, and particularly by virtue of the provisions of the Revised Statutes of the United States above referred to, and the provisions of other sections of said Revised Statutes cognate thereto, your petitioner at an early date entered into contractual relations with the United States whereby it became bound

to transport over such of its said lines of railway upon which "post routes" had been duly established by the Postmaster General all mail matter tendered to it at rates specifically agreed upon or especially authorized by law, and not otherwise.

IV.

Prior to July 1, 1873—that is, at various times in the years 1867-1872—the Postmaster General, for the purpose of arranging the railway routes on which the mails were being carried into three classes, according to the size of the mails, the speed at which
3 carried, and the frequency and importance of the service, so that each railway company should receive, "as far as practicable, a proportionate and just rate of compensation, according to the service performed" (acts of March 3, 1845, section 19, 5 Stats., 738, and June 8, 1872, chapter 335, 17 Stats., 309; sections 3997-3999, Revised Statutes of the United States), issued a "railroad weight circular" to the proprietors of the various railroad mail routes, requesting them to weigh all through and way mails conveyed in both directions to and from every station "for thirty consecutive working days" and to report results to the Department on a tabular form which was annexed to said circular.

Many of the company carriers complied with such request, and from time to time revisions and readjustments in the rates of mail pay, based upon such returns, were made, and in numerous cases of disagreement between the Department and the carriers such returns were referred to and used as a guide to the settlement of the dispute (Reports of Postmaster General for 1867 and subsequent years). Under such "railroad weight circular" it was the practice of the various railroad mail carriers, well known to and acquiesced in by the chief executive officials of the Post-Office Department, to weigh the mails carried in both directions to and from every station for an entire period of five weeks or thirty-five days, which period necessarily contained thirty consecutive working or secular days and five non-secular or Sabbath days, and having thus ascertained the whole weight of the mails carried for "any distance" and the average weight carried the whole length of the line for such entire period, the latter average weight was then divided by 30, the number of secular or working days contained in said weighing period, and the average total weight carried the whole distance or entire length of the line "per day" was thus ascertained. The result so ascertained, considered in connection with the speed at which the mails were conveyed on the several lines and the "importance" of the service, de-
4 termined the "class," whether "first," "second," or "third," of the particular "route," and likewise determined the maximum rate of the compensation which the Postmaster General by law was authorized to contract to pay for service on such route, all such maximum compensations being prescribed by the statute in terms of "dollars per mile per annum."

V.

Great complaint having been made by some of the principal railroad companies carrying the mails because of the inadequacy of the pay received for such service, the Postmaster General, "in justice to this class of roads," recommended "a careful revision and readjustment by Congress of railroad compensation and the establishment of such rates as will be just and equitable to all concerned" (Report Postmaster General for 1869, pp. 11, 12), and such complaints and recommendation were followed by the enactment by the Congress in and as a part of the act making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, approved March 3, 1873 (17 Stats., 558, sec. 4002), of the following, to wit:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or as much thereof as may be necessary: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

VI.

Subsequent to the enactment of the above-quoted provisions of law the Postmaster General, for the purpose of putting the same into effect, adopted the division of the United States into four sections theretofore made, and provided for the weighing of the mails in each section in rotation once in each four-year period, and fixed the compensation to be paid for service to be rendered on each and all railway routes in each section for the ensuing term of four years

by multiplying the number of miles in length of the route over which the transportation was to be had by the maximum rate or amount specified in said law of 1873 as applicable to the average weight of the mails carried per day throughout the whole length of the particular route.

In administering the provisions of the act of March 3, 1873, prior and up to July 1, 1876, the daily "average weight" carried was ascertained in each instance by the railroad companies transporting the same, and subsequent to that date by Government agents acting under the direction of the Postmaster General, by actually
6 weighing the mails as and when transported during weighing periods of thirty-five days (later of 105 days) and dividing the total weight so ascertained by 30 days (or 90 days), such divisors representing the total "successive working" or secular days contained in each of such weighing periods, the quotient so obtained being accepted by the Department and the carriers as representing the "average weight of the mails per day" carried throughout the whole length of any particular route.

In practice the average weights of mails carried and the compensation to be paid to the railway company carriers therefor was represented and evidenced as follows, to wit:

To each railway company over whose rails or any portion thereof mail routes had been or were about to be established the Second Assistant Postmaster General, acting in such regard by direction of the Postmaster General, sent a so-called "distance circular," the same being a printed circular of instructions with blank forms attached, upon which forms the companies receiving the same were requested to inform the Department as to the names of stations and distances between stations and junction points at which the mails were to be handled, the names of stations at which agents were maintained and of those at which no agent or other employee was maintained, the names of post-offices receiving mail directly from the route, the distances by shortest route used by the public between nearest baggage-room door and nearest practicable door of post-office building, etc., etc., all of which information when scheduled as desired was verified as correct by some competent officer of the company. Upon the second page of such "distance circular" appeared the following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

"____ ____,

"*President or General Manager.*"

7 When this agreement had been properly signed and the "distance circular" containing the same, together with the information requested, had been verified and returned to the Department, and the weighing of the mails on the particular route for the particular weighing period had been completed and the daily average weight of mails carried the whole length of the route had been ascertained in the manner heretofore described, the Postmaster General, as authorized by law, fixed the compensation to be paid to

the carrier for the service to be rendered in carrying the mails upon the particular route for the ensuing term of four years and there was sent to the carrier formal notice of such action in the form following, to wit (omitting headings and titles):

"The compensation for the transportation of mails on route No. —, between —— and ——, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing ——, 18—, at the rate of $—, per annum, being $— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

VII.

The Postmaster General had full legal authority to contract in such manner with carriers by rail for the carriage of the mails without previous advertisement (R. S. U. S., sec. 3942), and since the date of the enactment of said act of March 3, 1873, to the present time has uniformly done so. For the service thus contracted for it has been the uniform and consistent practice of the Post-Office Department, so far as the mail routes referred to in this petition are concerned, to pay at the maximum rates provided and allowed by the current law.

8 VIII.

By an act of Congress approved July 12, 1876, making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1878 (19 Stats., 79), the Postmaster General was—

"directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by"

the act of March 3, 1873, and by act of Congress approved June 17, 1878, making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1879 (20 Stats., 142, —), the Postmaster General was required to still further reduce the compensation to be paid for the transportation of mails on railroad routes

"five per centum per annum from the rates for transportation of mails, on the basis of the average weight fixed and allowed by the first section"

of the act of July 12, 1876, next above referred to.

IX.

In administering said provisions of said acts of 1876 and 1878 and in making the reductions therein specified and required the Postmaster General used as bases the maximum rates of pay provided for in and by the act of 1873, as ascertained by the method and practices respecting average weights adopted by the Department and hereinbefore described, which said methods and practices, until about June 7, 1907, were uniformly and consistently followed
9 and practiced by the Post-Office Department, so far as the mail routes referred to in this petition are concerned.

X.

The method of determining a proper and equitable rate of compensation for the transportation of the mails on railroad routes constituted the subject of various official representations to the Congress by succeeding Postmasters General, who not infrequently referred in such reports to the unscientific and in some respects unsatisfactory method in vogue for fixing the same, which method, however, had been and continued to be in use by the Department for many years. The annual report of the Postmaster General to the Congress for the year 1884, contained at page 106 and subsequent pages thereof, a draft of a proposed bill for the readjustment of such compensation, which draft among other things proposed to alter the then existing method and practice of obtaining daily average weights of mails carried, by providing that such daily average weights should be ascertained "by a weighing of not less than twenty-eight consecutive days." Later a bill containing such a provision was introduced in the House of Representatives, but no action by the House was had thereon.

In September, 1884, the then Postmaster General promulgated a postal regulation known as "Order No. 44," which was in words and figures following, to wit:

"Order No. 44. Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

And thereafter, on October 22, 1884, the then Postmaster General submitted to the Attorney General of the United States for his opinion the question as to whether the method of ascertaining
10 the average daily weight of mails carried in use in the Department and hereinbefore described (not including the method described in Order No. 44), was a proper method of ascertaining such average weight under the provisions of said act of March 3, 1873 (R. S. U. S., section 4002).

October 31, 1884, the then acting Attorney General, Mr. Samuel F. Phillips, replied (18 Ops. Att'y Gen'l, p. 71) to such submission as follows:

"SIR: I have considered your communication of the 22d instant, requesting to know whether the construction placed by the Post-Office Department on section 4002, subordinate section 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained, is correct, and am of opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment."

And consequently said "Order No. 44" never went into practical use and effect.

January 21, 1885, the then Postmaster General, complying with the Senate resolution adopted January 19, 1885, transmitted to the Senate a certain communication which was subsequently printed as Senate Executive Document No. 40 of the Forty-eighth Congress, second session, wherein the Postmaster General gave "a documentary history of the railway mail service from its origin in 1834 until the present time," and specifically called attention to the manner in which the said act of March 3, 1873, (R. S. U. S., section 4002, subsec. 2), had been administered in obtaining the daily average weight of mails carried on railroad routes.

The Congress being so fully and officially informed of the construction placed upon the quoted provisions of said act of March 3, 1875 (R. S. U. S., section 4002, sub-sec. 2), and of said subsequent acts approved July 12, 1876 (19 Stats., 19), and June 17, 1878
11 (20 Stats., 142), hereinbefore referred to and the method and practices prevailing in the Post-Office Department in the administration of said acts, nevertheless, by the act approved March 3, 1905, "Making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1906" (33 Stats., 1082 1088), provided:

"That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Thereafter, in administering such quoted provision of said act of 1905, the Postmaster General continued the method and practice of ascertaining the daily average weight of mails carried on railroad postal routes which had theretofore prevailed in the administration of the act of 1873 and subsequent cognate statutes hereinbefore referred to, with the single exception that in the place and stead of the former weighing period of thirty-five days there was adopted and put in force a weighing period of one hundred and five days, which latter period was intended to include and uniformly did include "a number of successive working days not less than ninety" as prescribed by said act of 1905, the number ninety being used as a divisor instead of the number thirty as theretofore.

## XI.

Subsequent to said March 3, 1905, the Post-Office Department adopted and used in connection with the so-called "Distance Circular" hereinbefore described a form of notice respecting the compensation fixed for service in carrying the mails on the various
12 railroad postal routes, which notice (omitting headings, address, and titles) was and is in the words and figures following, to wit:

"The compensation for the transportation of mails, etc., on Route No. —, between —— and ——, has been fixed from July 1, 190–, to June 30, 190– (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, and March 3, 1905, upon returns showing the amount and character of the service for — successive working days, commencing ——, 190–, at the rate of $— per annum, being $— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

## XII.

At the second session of the Fifty-ninth Congress the Committee on Post-Offices and Post-Roads of the House of Representatives prepared and introduced a bill making appropriations for expenses of the Post-Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As drawn by said committee said bill contained, among other things, the following provision:

"Provided, That hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Said bill was accompanied by a report of said committee which fully explained the construction and practice, under said previous acts of Congress, in the weighing of the mails, and that the purpose of said provision in the bill was to change the method of ascertaining
the daily average weights by requiring that all of the days in
13 the weighing period be included in the divisor. There was extensive debate in the House on said provision, in which many members participated. In said debate the chairman of said committee and other members of the House stated and discussed the history, as hereinbefore narrated, of said existing practice of including the secular days only in the divisor of weights. Before the House had acted on said provision a motion was made to amend the bill by inserting the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor."

Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

14 "Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

Said second amendment was also rejected after debate, and the provision reported by the Committee on Post-Offices and Post-Roads was then stricken out. Thereafter an amendment was offered by the chairman of said committee, which was adopted by the House as follows:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

When this bill had gone from the House of Representatives to the

Senate and had been reported by the Senate Committee on Post-Offices and Post-Roads an amendment was offered in the identical language of the amendment first rejected by the House. Said amendment was not debated or explained but was adopted by the Senate. The bill was then sent to a conference of the two Houses. In the conference objection was made on the part of the House conferees to said Senate amendment, and the committees of conference in their report recommended that the Senate recede from the same, and the two Houses adopted said reports and passed the bill (which as above stated became law March 2, 1907; 34 Stats., 1205, 1212) with said amendment stricken out, but containing in the precise form above quoted the provision which had been inserted by amendment in the House of Representatives.

When offering the amendment which was adopted in the House, the chairman of the Committee on Post-Offices and Post-Roads pointed out that the pending bill had provided four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and he explained that two of said four reductions, viz., that carried by the amendment he was offering and one other, relative to pay for post-office cars, had been selected as those which the House apparently preferred to adopt.

## XIII.

Thereafter, on March 2, 1907, and on June 7, 1907, the Postmaster General promulgated certain postal regulations which were designated and are respectively known as Order No. 165 and Order No. 412, which said orders read as follows, to wit:

"Order No. 165. That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."

"Order No. 412. Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

" 'That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.' "

In accordance with the last-named order, which was intended to cover all weighings and readjustment made subsequent to its promulgation, the Postmaster General required all mails carried on railroad routes to be weighed during the entire weighing period of 105 days and divided the aggregate weights so obtained by 105, and the readjustments were made on the basis of average weight per day so computed and ascertained, and the carrier company has since been paid accordingly.

## XIV.

Prior to the year A. D. 1873, and for the entire period subsequent to said year and prior to July 1, 1909, your petitioner directly or through its predecessors had owned and operated over its various

lines of railway certain railway postal routes, said postal routes being more specifically designated by numbers as follows, to wit:

| | | | |
|---|---|---|---|
| 107001 | 107035 | 107103 | 107144 |
| 107013 | 107036 | 107106 | 107163 |
| 107014 | 107037 | 107107 | 107164 |
| 107016 | 107039 | 107115 | 107168 |
| 107017 | 107049 | 107119 | 107171 |
| 107018 | 107071 | 107125 | 110065 |
| 107021 | 107083 | 107129 | 110139 |
| 107022 | 107087 | 107138 | 110228 |
| 107034 | | | |
| 104025 | 104030 | 104066 | 104074 |
| 104028 | 104031 | 104068 | 107069 |
| 104029 | 104041 | | |

on all of which routes the average weight of mails so carried and the amount of the compensation to be paid and which was
17 paid to petitioner for the service rendered in connection with such carriage, had been ascertained, fixed, and notified to your petitioner in the manner and by the method and practices hereinbefore pointed out as adopted by and in use by the Post-Office Department, not including therein, however, the practices prescribed by either of the said orders numbered 165 or 412. Due performance of all contracts for compensation so entered into by and with your petitioner for the services rendered by it on said routes prior to June 30, 1909, has been made by the United States and no question is here raised or claim made with respect thereto.

## XV.

Prior to the end of the quadrennial term expiring June 30, 1909, on the routes operated by your petitioner and above specified, the Postmaster General notified petitioner of the directions respecting the ascertainment of the daily average weight of the mail carried which were contained in and prescribed by Order No. 412, and accompanied such notices with blank forms of "Distance Circular," sometimes called "Form No. 2504," the substance of the contents of which circular has hereinbefore been set forth. Copies of "Form No. 2504" so transmitted to and received by your petitioner contained the so-called "acceptance clause," hereinbefore quoted in full.

Before the weighing of the mails carried on its various routes for the quadrennial term beginning July 1, 1909, and ending June 30, 1913, had been completed and the daily average weight carried had been ascertained and noted as required by said directions, your petitioner, with respect to each of its aforesaid routes, returned to the Second Assistant Postmaster General the completed distance circular containing the agreement clause set forth therein, duly executed by one of its executive officers, authorized so to do, with specific exception thereon noted to Order No. 412; such agreement

18 clause, as modified by the claimant's exception and as executed by it, reads as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the existing regulations of the Department applicable to railroad mail service, excepting Order No. 412, issued by the Postmaster General June 7, 1907. This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General March 2, 1907."

In reply the Second Assistant Postmaster General wrote to petitioner in respect to each of said postal routes substantially as follows:

"SIR: This office is in receipt of your letter of the —, enclosing distance circular for the term beginning July 1 on routes of the lines above named, as follows:

* * * * * * *

"Note is taken of the modification made by the companies in the agreement clause in which they except Order No. 412, issued by the Postmaster General June 7, 1907. In regard to this I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term named above and during the continuance of such performance of service, these companies will be subject, as in the past, to

19 all the postal laws and regulations which are now or may become applicable during the term to this service.

"Very respectfully,

"JOSEPH STEWART,

*"Second Assistant Postmaster General."*

And notwithstanding your petitioner's said protests the Postmaster General caused the mails to be weighed on each of said routes for 105 days, then caused the average daily weight carried thereon to be computed as provided in said Order No. 412, and on the basis of the weight so ascertained caused the compensation for the service to be calculated, and subsequently issued orders stating the amounts and rates of such compensation. Said orders were in the form below:

"No. of order —, route —, and —, — miles, t. a. w., a. d. w.

"From July 1, 1909, to June 30, 1913, pay the —— Railroad Co. quarterly for the transportation of the mails between —— and —— at the rate of — per annum, being — per mile for — miles, and for R. P. O. car service at the rate of — per annum, being $— per mile for — miles, — to — for — lines — foot cars. This adjustment is

subject to future orders, and to fines and deductions, and is based on a service of not less than 6 round trips a week.

"FRANK H. HITCHCOCK,
*"Postmaster General."*

Thereafter, as to each of said routes, the Second Assistant Postmaster General sent a notice to claimant of such readjustment of pay for the service beginning July 1, 1909, such notice being in the form following, to wit:

"SIR: The compensation for the transportation of mails, etc., on route No. —, between —— and —— has been fixed from July 1, 1909, to June 30, 1913 (unless otherwise ordered), under acts of March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing —, at the rate of $— per annum, being $— per mile for — miles, and pay is allowed for use of R. P. O. cars from July 1, 1909, to June 30, 1913, at the rate of $— per annum, being $— per mile for — miles, — to —, for — lines — foot cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

"Very respectfully,

"JOSEPH STEWART,
*"Second Assistant Postmaster General."*

## XVI.

Under the circumstances above narrated, and under protest against the application to each and every of its said postal routes of said postal regulation or Order No. 412, commonly referred to as "Divisor Order No. 412," which said regulation or order petitioner has continually asserted and hereby asserts the Postmaster General was without legal power or authority to issue or to make application thereof in so far as either ascertaining the daily average weight of mails carried over its said postal routes, or fixing the compensation to be paid to it for the service rendered in so doing is concerned, your petitioner has expeditiously, safely, and with certainty carried all the mails which have been tendered to it for transportation since July 1, 1909, and for all such service so rendered, notwithstanding its said protest and the lack of lawful authority on the part of the Postmaster General so to do, your petitioner has been paid only at the reduced rates of compensation ascertained by the application and use of said unjust and illegal Divisor Order No. 412.

## XVII.

The premises considered, your petitioner alleges that it has been illegally and improperly deprived of compensation for the

21 services rendered by it to the United States in transporting the mails which have been tendered to it by the Post-Office Department for transportation over its postal routes aforesaid during the period from July 1, 1909, to July 1, 1913, in the sum of one million two hundred sixty-one thousand three hundred eighty dollars and thirty-seven cents ($1,261,380.37), for which amount, the same remaining wholly unpaid, petitioner here prays judgment against the United States.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By A. H. SMITH, *President.*

STATE OF NEW YORK,
*County of New York:*

I, Alfred H. Smith, being first duly sworn, depose and say that I am the President of The New York Central & Hudson River Railroad Company, and am authorized to execute the foregoing and annexed petition. I have read said petition and know the contents thereof and the matters of fact therein alleged are true to the best of my knowledge, information, and belief.

A. H. SMITH, *President.*

Subscribed and sworn to before me this 30th day of March, A. D. 1914.

[NOTARIAL SEAL.] J. M. O'MAHONEY,
*Notary Public, New York Co., N. Y., No.* 2911.

New York Co. Register No. 5074.
My commission expires March 30, 1913.

McKENNEY, FLANNERY & HITZ,
*Hibbs Building, Washington, D. C.,*
*Attorneys for Claimant.*

22 II. *General Traverse.*

Court of Claims.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On January 22, 1918, the case was argued by Mr. F. D. McKenney, for the claimant; arguments were also made by the Solicitor General, Mr. John W. Davis, and Assistant Attorney General, Mr. Huston Thompson, for the defendants in all the cases; on January 23, 1918, the case was submitted on arguments made in this and other Divisor cases.

23 IV. *Findings of Fact and Conclusion of Law.*

Filed March 11, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of Fact.*

I.

The plaintiff herein, The New York Central and Hudson River Railroad Company, is a corporation organized and doing business under the laws of the State of New York, and is now, and for many years has been, the owner of and engaged in maintaining and operating as a common carrier of passengers and freight, certain lines of railway in and through various States of the United States, among others the States of New York and Massachusetts. Each and every of such lines of railway is a duly constituted "post road" over and along which the Postmaster General of the United States was and is authorized by law to agree with plaintiff for the carriage of the mails and pay for such service.

The particular lines and postal routes hereinafter referred to, over which plaintiff during the times mentioned transported the mails of the United States, are the following:

| Route. | Termini. | Period. |
|---|---|---|
| 107011. | New York (Grand Central Station) and Buffalo, N. Y. | July 1, 1909, to June 30, 1913. |
| 107013. | Syracuse and Rochester, N. Y. | Do. |
| 107014. | Canandaigua and North Tonawanda, N. Y. | Do. |
| 107016. | Buffalo and Lewiston, N. Y. | Do. |
| 107017. | New York (155th Street Station) and Brewster, N. Y. | Do. |
| 107018. | Rochester and North Tonawanda, N. Y. | Do. |
| 107021. | Rochester and Charlotte, N. Y. | Do. |
| 107022. | New York (Grand Central Station) and Chatham, N. Y. | Do. |
| 107034. | Bridge Station (Niagara Falls) and Richland, N. Y. | Do. |
| 107035. | Watertown and Cape Vincent, N. Y. | Do. |
| 107036. | Rome and Massena Springs, N. Y. | Do. |
| 107037. | Syracuse and Pulaski, N. Y. | Do. |
| 107039. | Newton Falls and Sacket Harbor, N. Y. | Do. |
| 107049. | Gouverneur and Edwards, N. Y. | Do. |
| 107069. | Hudson and Chatham, N. Y. | July 1, 1909, to June 30, 1911. |
| 107071. | Syracuse and Earlville, N. Y. | July 1, 1909, to June 30, 1913. |
| 107087. | Utica and Ogdensburg, N. Y. | Do. |
| 107103. | Lyons, N. Y., and Williamsport, Pa. | Do. |
| 107106. | Albany and Troy, N. Y. | Do. |
| 107107. | Lockport Jct. (n. o.) and Suspension Bridge (n. o.), N. Y. | Do. |
| 107115. | Rivergate (n. o.) and Clayton, N. Y. | Do. |
| 107119. | Herkimer and Malone, N. Y. | Do. |
| 107125. | De Kalb Junction and Ogdensburg, N. Y. | Do. |

| | | |
|---|---|---|
| 107129. | New York (foot Desbrosses Street) and Albany, N. Y. | Do. |
| 107138. | Oswego and Woodard Junction (n. o.), N. Y. | Do. |
| 107144. | Churchville Junction (n. o.) and Buffalo (Exchange Street Depot), N. Y. | Do. |

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| | | |
|---|---|---|
| 107163. | Dolgeville and Little Falls, N. Y. | May 1 to June 30, 1913. |
| 107164. | Canadian Boundary line (n. o.) and Tupper Lake, N. Y. | Do. |
| 107168. | Lake Clear Junction (n. o.) and Saranac Lake, N. Y. | July 1, 1909, to June 30, 1913. |
| 110065. | Kress and Antrim, Pa. | Do. |
| 110139. | Lawrenceville and Ulysses, Pa. | Do. |
| 110228. | Jersey Shore and Mahaffey, Pa. | Do. |
| 104025. | Boston, Mass., and Albany, N. Y. | July 1, 1909, to June 30, 1911. |
| 104028. | South Framingham and Milford, Mass. | Do. |
| 104029. | Pittsfield and North Adams, Mass. | Do. |
| 104030. | Palmer and Winchendon, Mass. | Do. |
| 104031. | North Brookfield and East Brookfield, Mass. | Do. |
| 104041. | East Somerville (n. o.) and South Terminal Station (n. o.), Mass. | Do. |
| 104066. | Spencer and South Spencer, Mass. | Do. |
| 104068. | Springfield and Athol, Mass. | Do. |
| 104074. | Boston and Riverside Junction (n. o.), Mass. | Do. |

2—500

In the construction of the above-indicated lines of railroads the plaintiff was not aided by any grant of lands or other property made thereto by the United States.

II.

In 1867 the mails were being conveyed under agreements made between the railroad companies and the Post Office Department in pursuance of the act of Congress of 1845, and thereafter were carried up to the time of the passage of the act of 1873 under similar agreements. At the latter date a majority of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays. A much smaller number of railroad postal routes carried mails one or more times each day in the week, so as to make not less than seven round trips per week, and these carried mails on Sundays.

After order No. 412 was promulgated and became effective for the routes involved the service performed by plaintiff thereon was on six days in the week on routes Nos. 104028, 104030, 104031, 104041, 104066, 104068, 104074, 107013, 107014, 107017, 107021, 107022, 107035, 107049., 107069, 107107, 107119, 107125, 107138, 107144, 107163, 107164, 110139, and 110228, the aggregate annual pay for which was $111,318.33; and seven days in the week on routes Nos. 104025, 104029, 107011, 107016, 107018, 107034, 107036, 107037, 107039, 107071, 107087, 107103, 107106, 107115, 107129, 107168, and 110065, the aggregate annual pay for which was $2,170,121.46.

After the enactment of the act of 1873 the mails were carried by plaintiff over railroad postal routes under agreements between the Post Office Department and plaintiff, and were being so carried at the date of order No. 412, promulgated June 7, 1907. At said date the relative proportion of seven and six days' carriage of mails had changed, and over a majority of the railroad postal routes mails were being carried every day in the week.

III.

For a long time previous to 1867 mails were carried by railroad companies under separate contracts between such companies and the Post Office Department under authority of the acts of Congress referred to by the Postmaster General in his report for 1867, namely, those approved July 7, 1838, 5 Stat., 283; January 25, 1839, 5 Stat., 314, and March 3, 1845, 5 Stat., 732–738. The last-named act provided that to insure as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail, it should be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboat, into three classes, according to the size of the mails, the speed with which conveyed, and the importance of

the service, and it should be lawful for him to contract for conveying the mail with any such railroad company, either with or without advertising for such contract. Maximum rates were fixed for service rendered by the three classes, respectively, and the Postmaster General was authorized, in case he should not be able to conclude a contract for carrying the mail on any of such railroad routes at a compensation not exceeding the maximum rates, or for what he might deem a reasonable and fair compensation for the service to be performed, to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route, by horse, express, or otherwise, at the greatest speed that could reasonably be obtained, and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed.

With reference to the ascertainment of the "size of the mails" in order to make the classification authorized by the last named act, the above-mentioned Postmaster General's report states as follows:

"In order to make such an arrangement and classification of railroad routes as the act last mentioned contemplates, there is an obvious necessity for accurate and reliable information as to the 'size of the mails' they severally convey. Yet, until recently, no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively. In February and March last, however, a 'railroad weight circular' (a copy of which is hereto annexed) was issued and addressed to the proprietors of each railroad route, requesting them to 'weigh all the through mails and way mails' conveyed in both directions to and from every station for 30 consecutive working days, commencing on all roads east of the Rocky Mountains on the 1st, and on all roads west on the 15th of April, 1867, and report the results to the department in a prescribed tabular form annexed to the circular, and to return also a description of the accommodations provided for mails and agents, with the dimensions, fixtures, and furniture of the car or apartment allotted to their use, and a statement of the number of trips per week in each direction.

* * * * * * *

"No general systematic revision and readjustment of these rates, based upon the returns received, has yet been attempted, but in a number of cases of disagreement between the department and railroad companies the returns have been used as a guide to a proper settlement of the dispute; and, as the terms of existing contracts expire and it becomes necessary to enter into new engagements,
26 it is expected that such changes will from time to time be made as will eventuate ultimately in the nearest practicable approach to a perfect classification of railroad routes and graduation of their pay according to the comparative value and importance of the service they perform."

The result furnished data for each route respecting the whole weights of mails carried in each direction, the total weight and the

average weight carried the whole distance for the 30 consecutive working days, and the average weight carried the whole distance per day, ascertained by dividing such average total weight by 30, the size of mail car or apartment, and the number of trips performed per week.

In the years 1868, 1869, 1870, 1871, and 1872, revisions and readjustments of the rates of pay on railroad routes were made under the terms of the law of 1845 according to classifications based upon the returns of the weight of the mails conveyed and the accommodations provided for the mails and the agents of the department, ascertained in the manner above stated. (See Reports of Postmaster General, 1868, p. 10, Table E, pp. 66, 67; 1869, pp. 10, 11, Table F, pp. 86, 87; 1870, pp. 10, 11, Table E, pp. 82, 83; 1871, p. x, Table E, pp. 48, 49; 1872, pp. 10, 11, Table E, pp. 100, 101.)

In the reports of the Postmaster General for the years 1869, 1870, and 1871, he called attention to complaints on the part of railroad companies to the inadequacy of compensation for carrying the mails, and in his report of 1870 it was stated that many of them have refused and still refuse to enter into contracts with the department, alleging that they would not bind themselves by a permanent arrangement at the present prices, and that as a consequence on many of the important roads the mails were carried as suited the convenience of the companies.

In the revision and consolidation of the statutes relating to the Post Office Department, done in 1872, 17 Stat. L., 309, certain provisions of the postal laws were changed.

The following year Congress passed the act of March 3, 1873, which is set out in the appendix to these findings.

A part of the act of 1873 was embodied in the Revised Statutes as section 4002.

Prior to July 1, 1876, the weighing was done by the railroad companies transporting the mails as above set forth. Subsequent to that time, by virtue of an act of Congress approved March 3, 1875, the weighing was done by Government agents under the direction of the Postmaster General. (See Appendix.)

## IV.

Subsequent to the act of 1873 the Postmaster General, for the purpose of putting said act into effect, adopted the division of the United States, theretofore made into four sections, and had the mails weighed and the annual compensation for a term of four years stated for all railway routes in one section each year.

Before the compensation was stated for any route the Postmaster General secured from the company performing the service an agreement in the form following:

27 "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

After the weighing of the mails was completed and the compensa-

tion for the transportation thereof was fixed for the term the Postmaster General caused to be sent to each railroad company a notice in the form following:

"The compensation for the transportation of mails on route No. —, between —— and ——, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing —, 18—, at the rate of $— per annum, being $— per mile for — miles."

"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week."

After the passage of said act of March 3, 1875, whereby the weighings were required to be made by employees of the Department under instructions of the Postmaster General as above stated, the mails were weighed for 30 consecutive days, exclusive of Sundays, on routes not carrying mails on Sundays, and on 35 successive days, inclusive of Sundays, on routes carrying mails on Sundays, the Sunday weights being reported with the Monday weighings. The totals of the weighings in each class were used as a dividend, and in both classes 30 was used as a divisor. The quotient so obtained was treated as the average weight of mails per day carried.

From and after 1873 and until order No. 412 became effective, it was the practice of the Postmaster General, when computing the compensation payable to railroad carriers for service to be performed in transporting the mails over the several routes, to apply to the quotient obtained as above set forth, or by the act of 1905 which increased the minimum weighing days, the maximum rate allowed by statute, except in the cases of certain routes where pay was fixed, without weighing at the lowest maximum rate specified in the current law; "lap-service" routes, being cases where two different routes coincide in part over the same line of railway and the pay is adjusted on a reduced sliding scale (P. L. & R., 1913, sec. 1325); "blue tag" routes over which periodical matter is transported in sacks marked with a blue tag, in fast freight trains, at less than maximum mail rates; and "equalization rates" where competition on basis of shorter mileage occurs between carriers, and the elder road possessed of the longer mileage and the mail contract is encouraged to retain the route, but at compensation based on the lesser mileage of the junior and shorter line.

## V.

The act of Congress approved July 12, 1876, and June 17, 1878 (see Appendix), each prescribed reductions in the rates of pay to railroad companies for the transportation of the mails.

In administering the provisions of said acts of 1876 and 1878, and in making the reductions therein specified, the Postmaster General started with the maximum rates of pay allowed by the act of
28 1873, and the pro rata maxima prescribed by the regulations of the department for intermediate weights and reduced the

rates in accordance with said acts. The maximum rates taken in connection with the averages, found as stated, and the mileage involved, furnished the amount of the annual compensation.

## VI.

In his report for the fiscal year ending June 30, 1884, the Postmaster General refers to the matter of "railroad rates," as embodied in the report of the Second Assistant Postmaster General, to which he called careful attention, and adds that "it is important that the rates paid should be arrived at by some equitable method." He says that in the 50 years intervening between 1834 and 1884 "legislation has touched this subject but four times"—in 1838, 1839, 1845, and 1873; that while the system of 1873 was an improvement on what went before, it was "still objectionable," "since it undertakes to pay for weight chiefly," and that the pay per ton per mile ranged from 8 to 96 cents. He recommended the passage of a proposed bill for the readjustment of compensation for the transportation of the mails on railroad routes.

Following this report said bill was introduced in the House, but no action was taken by the House on said bill, H. R. 3057 and 6124, 49th Cong.

In September, 1884, the then Postmaster General prepared and issued an order in the form following:

"Order No. 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Thereafter, October 22, 1884, the succeeding Postmaster General submitted the question to the Attorney General for his opinion as to whether the method adopted was a proper construction of the act of March 3, 1873, as follows:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

" 'That the pay per mile per annum shall not exceed the following rates, namely:

" 'On routes carrying their whole length an average weight of mails per day of 200 pounds, $50; 500 pounds, $75; 1,000 pounds, $100; 1,500 pounds, $125; 2,000 pounds, $150; 3,500 pounds, $175, etc.' * * *

" 'The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty.' * * *

"Upon a large number of the railroad routes mails are carried on six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873, in arriving at the average weight of mails per day on these classes of service to treat the

29 'successive working days' as being composed of six secular or working days in the week, which is explained by the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mails are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 is obtained.

| | | |
|---|---|---|
| Transportation per mile of road per annum | miles.. | 1,252 |
| Weight per mile of road per annum | tons.. | 313 |
| Pay per ton per mile of road per annum | cents.. | 47.92 |
| Pay per mile run of road per annum | do... | 11.09 |
| Rate of pay allowed per mile per annum | | $150 |

"On route No. 2 mails are carried twice daily, seven days per week, and weighed for 30 successive working days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

| | | |
|---|---|---|
| Transportation per mile of road per annum | miles.. | 1,460 |
| Weight per mile of road per annum | tons.. | 313 |
| Pay per ton per mile of road per annum | cents.. | 47.92 |
| Pay per mile run | do... | 10.02 |
| Rate of pay allowed per mile per annum | | $150 |

"I have thought it necessary to give the foregoing illustrations in order that the practice of this department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,
*"Postmaster General.*

"Hon. B. H. Brewster, Attorney General, Department of Justice."

In reply, the Acting Attorney General gave his opinion as below:

"Department of Justice,

"Washington, October 31, 1884.

"The Postmaster General.

"SIR: I have considered your communication of the 22d instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the

mode in which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
*"Acting Attorney General."*

This Order No 44 was thereafter, in January, 1885, revoked, and no weighings having occurred in the meantime, it never had any practical operation or result.

30 VII.

What is called "A documentary history of the Railway Mail Service from its origin in 1834 to the present time," prepared by the general superintendent of the Railway Mail Service, was transmitted to the Senate with a letter by the Postmaster General on January 21, 1885, in compliance with a resolution of the Senate, and among other things said document refers to the method of obtaining the weights of mail carried. Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

VIII.

The act of March 3, 1905, 33 Stat. L., 1088, changes the minimum weighing period provided by the act of 1873 so as to require the inclusion of at least 90 instead of at least 30 successive working days. (See Appendix.)

The Post Office appropriation bill for the fiscal year ending June 30, 1906, as reported to the House of Representatives by its Committee on the Post Offices and Post Roads, contained the following:

"For inland transportation by railroad routes * * * $40,000,000. Provided, That hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed, and the average weight per day ascertained for a period of not less than three consecutive months."

Said proviso was stricken out in the House of Representatives and the following was adopted in lieu thereof and became a part of the act approved March 3, 1905:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct." (See Cong. Rec., 58th Cong., 3d sess., p. 1744.)

In the administration of said act the Postmaster General made no change in the said system of weighing the mails theretofore adopted,

except to weigh the mails for a period of 105 days instead of for a period of 35 days, and to use as a divisor 90 instead of 30 to ascertain the average weight, until the issuance of Order No. 412, set forth in Finding XI.

## IX.

Subsequent to said act of March 3, 1905, the Post Office Department adopted and used in connection with the so-called "Distance Circular" hereinbefore described a form of notice respecting the compensation fixed for service in carrying the mails on the various railroad postal routes, which (omitting headings, address, and titles) was and is as follows, to wit:

"The compensation for the transportation of mails, etc., on Route No. —, between —— and ——, has been fixed from July 1, 190–, to June 30, 190– (unless otherwise ordered), under acts of March 3, 1873, July 13, 1876, June 17, 1878, and March 3, 1905, upon returns showing the amount and character of the service for — successive working days, commencing —— —, 190–, at the rate of $— per annum, being $— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

## X.

At the second session of the Fifty-ninth Congress the Committee on Post Offices and Post Roads of the House of Representatives reported out a bill making appropriations for expenses for the Post Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As reported out said bill contained, among other things, the following:

"Provided, That hereafter the average weight per day be ascertained, in every case by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The bill was accompanied by a report of said committee which explained the construction and practice followed under said previous acts of Congress, in weighing of the mails, and stated that the purpose of above-quoted provision was to change the method of ascertaining the daily average weights by requiring that all of the days in the weighing period should be included in the divisor. There was extensive debate upon said provision in the Committee of the Whole House on the state of the Union, in which the chairman of said committee and other Members of the House stated and discussed the history, hereinbefore narrated, of the existing practice of including the secular days only in the divisor of weights. Before action was had on said provision a motion was made to amend the bill by insert-

ing the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor. * * * It has been held further that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of new duties. And the limitation on the discretion
32 exercised under the law by a bureau of the Government is a change of existing law."

Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

This amendment was also rejected after debate, and the provision reported by the Committee on Post Offices and Post Roads was then stricken out. Thereafter an amendment was offered by the chairman of said committee, and adopted by the House as follows:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for

each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

As so amended the bill was passed by the House and went to the Senate.

When it had been reported out by the Senate Committee on Post Offices and Post Roads an amendment was offered from the floor in the identical language of the above amendment first rejected by the House. Said amendment was not debated nor explained, but was adopted by the Senate. The bill was then sent to a conference on part of the two Houses. In the conference objection was made on the part of the House of Representatives to said Senate amendment, and the committees of conference in their reports recommended that the Senate recede from the same, which it did, and the two Houses adopted said reports and passed the bill with said amendment stricken out, but containing the provision last above quoted.

When offering said provision in above form, and as it was enacted into law, the chairman of the House Committee on Post
33 Offices and Post Roads pointed out that the then pending bill had carried four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and explained that two of said four reductions, viz, that carried by the amendment he was offering and one other relative to pay for post-office cars, had been selected as those which the House apparently preferred to adopt.

## XI.

Thereafter the Postmaster General, on March 2, 1907, and June 7, 1907, respectively, issued orders as follows:

"Order No. 165. That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

"Order No. 412. Ordered, That Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order for all weighings and readjustments made subsequent to its promulgation, the Postmaster General weighed the mails on railroad routes for 105 days and divided the aggregate weight by 105, and the readjustments were made on the average weight per day so computed, and the plaintiff company was paid accordingly.

Thereafter the Postmaster General submitted to the Attorney General the order No. 412 for an opinion as to its legality, and the

Attorney General, under date of September 27, 1907, rendered an opinion sustaining the legality of said order. (26 A. G. Op., 390.)

## XII.

From 1873, to and including all the times hereinafter specified, plaintiff possessed and operated over certain lines of railway between Boston, Mass., and Albany, N. Y., Railway Mail Service Route No. 104025. During the period July 1, 1909, to and including June 30, 1911, the title of the company (plaintiff herein) operating said route was stated as New York Central and Hudson River Railroad Company, but effective July 1, 1911, the title thereto was changed with consent of the Postmaster General so as to read Boston and Albany Railroad (N. Y. C. & H. R. R. Co., Lessee).

The quadrennial term for which readjustments had been made on the routes of the plaintiff operated on June 30, 1909, as set forth in Finding I hereof, expired by limitation on that day. The Postmaster General, on August 17, 1908, wrote and plaintiff received the following letter:

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Division of Railway Adjustments.

"Washington, D. C., August 17, 1908.

"SIR: The General Superintendent, Division of Railway Mail Service, has been directed to weigh the mails carried on route
34 No. 104025, between Boston, Mass., and Albany, N. Y., for not less than ninety successive working days, commencing August 26, 1908, for the purpose of obtaining the data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1909, to June 30, 1913.

"The law requires that the weighing be done by sworn employees of the Post Office Department, and all Post Office Department employees will be instructed to take every precaution to secure correct weights, to provide against all irregularities, and to prevent any diversion of the mails from their usual channels during said weighing.

"This office, through the Superintendent Railway Mail Service for the division in which your road is located, will advise your company relative to the requirements of the department in connection with said weighing.

A distance circular for this route is forwarded herewith and you are requested to see that special care is given to the accurate filling of such circular in accordance with the instructions printed thereon, and that it be returned to this office as promptly as possible. Please cause to be forwarded with the circular when it is returned two copies of your latest working schedule.

In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's order No. 412, of June, 1907, which reads as follows:

'That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.'

Very respectfully,

JOHN W. HOLLYDAY,
*Acting Second Assistant Postmaster General.*

Messrs. Thompson & Slater, Agents New York Central & Hudson River Railroad Co., Washington, D. C."

The distance circular therein referred to was the usual distance circular, sometimes called Form 2504, before described, and contained the customary acceptance clause, before quoted, for signature of plaintiff's president or general manager. Plaintiff returned said distance circular with all blanks and verification appropriately filled in except the blank pertaining to the acceptance clause which it did not fill in nor sign, but appended thereto a form of acceptance clause bearing date of November 24, 1908, signed by its president, and reading as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and existing regulations of the department applicable to railroad mail service excepting order No. 412, issued by the Postmaster General, June 7, 1907. This company can not accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the
35 average weight applied by the department prior to the issuance of order No. 165, issued by the Postmaster General, March 2, 1907."

January 5, 1909, the Second Assistant Postmaster General acknowledged receipt of said distance circular and accompanying proposed acceptance, saying:

"This office is in receipt of your letter of January 2, accompanied by distance circulars covering the following routes:

"104025, Boston, Mass., to Albany, N. Y.; * * * all being for the term beginning July 1, 1909, and ending June 30, 1913.

"Note is taken of the modification made by you in the agreement clause, in which you except order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907, and otherwise agree to perform service under existing regulations. In regard to this I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the

postal laws and regulations which are now or may become applicable during the term to this service."

To said letter of January 5, 1909, plaintiff did not reply, but continued to and including June 30, 1909, to transport the mails over each and all of its said routes under the then current contracts before described, and has been paid in full for so doing. Without further correspondence than as above set forth between the Postmaster General, or any one acting for or on his behalf, and plaintiff, the Postmaster General, beginning July 1, 1909, and each and every day thereafter to and including June 30, 1913, caused the mails for transportation over each and all of said above specified routes to be delivered to plaintiff at its several receiving stations, and same was received and appropriately transported by plaintiff.

Subsequent to July 1, 1907, plaintiff received from the Postmaster General a communication reading as follows:

"Post Office Department,

Second Assistant Postmaster General,

Washington, July 1, 1909.

SIR: The compensation for the transportation of mails, etc., on route No. 104025, between Boston, Mass., and Albany, N. Y., has been fixed from July 1, 1909, to June 30, 1913 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days not less than 90, commencing August 26, 1908, at the rate of $305,253.67 per annum, being $1,523.45 per mile for 200.37 miles. * * *

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

36 Subsequently plaintiff likewise received from the same source a railway mail pay order relating to service upon and over route 104025 in the form following, to wit:

"Washington, D. C.,

"Wednesday, July 7, 1909.

"I hereby approve the following orders and regulations, originating claims and affecting the accounts of the Post Office Department and Postal Service in the following divisions:

* * * * * * *

"Second Assistant Postmaster General,
"Entire bureau, July 1, 1909.

* * * * * * *

"C. P. GRANDFIELD,
"*Acting Postmaster General.*

* * * * * * *

"Order No. B13067.
"Route No. 104025.
"Mass., Boston, Mass., and Albany, N. Y., 200.37 miles, 124.21 t. a. w., New York Central and Hudson River Railroad Co., a. d. w. 143,314 lbs.
"From July 1, 1909, to June 30, 1913, pay the New York Central and Hudson River Railroad Company, monthly, for the transportation of the mails between Boston, Mass., and Albany, N. Y., at the rate of $305,253.67 per annum, being $1,523.45 per mile for 200.37 miles. * * *
"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week."

Similar communications and orders were issued and received by plaintiff subsequent to July 1, 1907, concerning each of its other routes above specified, whereon the term of plaintiff's service began July 1, 1909.

XIII.

In obtaining the annual compensation stated in the foregoing order the Postmaster General had caused the mails as transported over each of said routes to be weighed for 105 successive days in each instance where said mails were carried every day in the week, including Sundays, and on 90 successive working days during such period of 105 days on routes where the mails were carried but six days in each week and not carried on Sundays, and in each and every instance had caused the aggregate total of the weights so ascertained to be divided by 105, being the total number of days included in the weighing period, as prescribed by order No. 412. From the quotient in each case and the maximum rate of compensation allowed by the act of 1873 and the reductions which were prescribed, respectively, by said acts of July 12, 1876, June 17, 1878, and March 2, 1907, and the mileage involved, the adjustment of compensation was effected. Rates are illustrated by the following table:

37 Transportation of Mails by Railroads—Table of Maximum Rates of Pay for Railroad Mail Service.

The maximum compensation for general railroad mail service and for service over land-grant railroads is shown in the following table:

| (1) | Pay per mile per annum. (2) | (3) | (4) | (5) |
|---|---|---|---|---|
| Average weight of mails per day carried over whole length of route. | Rates allowable under sec. 4002, R. S. (act of Mar. 3, 1873). | Rates allowable under acts of July 12, 1876, June 17, 1878, and Mar. 2, 1907 (see note 1). | Rates allowable to land-grant railroads under acts of July 12, 1876, June 17, 1878, Mar. 2, 1907, and May 12, 1910 (see notes 1 and 2). | Intermediate weight warranting allowance of $1 per mile under the law of 1873 and the practice of the department, subject to acts of July 12, 1876, June 17, 1878, and Mar. 2, 1907 (see note 1). |
| | | | | Pounds. |
| 200 pounds | $50.00 | $42.75 | $34.20 | .. |
| 200 to 500 pounds | ..... | ..... | ..... | 12 |
| 500 pounds | 75.00 | 64.12 | 51.30 | .. |
| 500 to 1,000 pounds | ..... | ..... | ..... | 20 |
| 1,000 pounds | 100.00 | 85.50 | 68.40 | .. |
| 1,000 to 1,500 pounds | ..... | ..... | ..... | 20 |
| 1,500 pounds | 125.00 | 106.87 | 85.50 | .. |
| 1,500 to 2,000 pounds | ..... | ..... | ..... | 20 |
| 2,000 pounds | 150.00 | 128.25 | 102.60 | .. |
| 2,000 to 3,500 pounds | ..... | ..... | ..... | 60 |
| 3,500 pounds | 175.00 | 149.62 | 119.70 | .. |
| 3,500 to 5,000 pounds | ..... | ..... | ..... | 60 |
| 5,000 pounds | 200.00 | 171.00 | 136.80 | .. |
| For each additional 2,000 pounds above 5,000 and less than 48,000 pounds | 25.00 | 20.30+ | 16.24+ | .. |
| Above 5,000 and less than 48,000 pounds | ..... | ..... | ..... | 80 |
| For each additional 2,000 pounds in excess of 48,000 pounds | 25.00 | 19.24 | 15.39 | .. |

| | Character of route. Nonland-grant. | Land-grant. |
|---|---|---|
| | Pounds. | Pounds. |
| Intermediate weight above 48,000 pounds warranting addition of $1, net | 103.96 | 129.96 |

No allowance is made for weights not justifying the addition of $1.

NOTE 1.—The act of Mar. 2, 1907, affects only routes carrying over 5,000 pounds.

NOTE 2.—The act of May 12, 1910, affects only land-grant routes carrying over 48,000 pounds.

## XIV.

The plaintiff continued to carry the mails of the United States from and after the 1st day of July, 1907, on its respective routes, as hereinbefore set forth, and has been paid for the service at the rates of compensation stated by such orders.

## XV.

The act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1909, as re-
38 ported to the House by the committee, contained no reference to the matter of weighings of the mails or to the question of the divisor. While in the Committee of the Whole an amendment was offered providing in effect that not exceeding six-sevenths of the amount payable under the orders adjusting pay in the two contract sections to which order 412 had not been applied should be paid out of the appropriation thereby made until such adjustment should have been made in accordance with order 412, or until it should have been finally determined by law that the first or then existing adjustment was binding upon the Government notwithstanding any error or wrong in the basis of such ascertainment. A point of order was raised on this in the House, and the chairman of the Committee of the Whole overruled it, and the amendment was agreed to. The bill with the amendment was passed by the House and sent to the Senate. It was reported from the Senate Committee on Post Offices and Post Roads to the Senate with a substitute amendment for the one passed by the House, which substitute amendment, among other things, provided that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average daily weight. A point of order was raised on this in the Senate and the president of the Senate overruled it, and then the amendment was agreed to. The bill with the amendment was passed by the Senate. A slight change was made by the conferees of the Senate and the House, and their agreement was reported to their respective bodies. The House, however, refused to adopt the Senate amendment and the Senate receded, and the provision failed of enactment. In the discussion of the bill in the Senate the active member of the committee in explaining the bill stated that the provision was intended to crystallize into law the requirement that seven days instead of six shall be used as the divisor in determining the amount due the railroad companies, and the chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a department official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law we avoid that possibility."

In the annual reports for the fiscal year 1907 and following years the Post Office Department stated its estimates of expenses for transportation by railroad routes, which estimates were calculated upon

the application of the new divisor in so far as the same had been applied from year to year. These reports reached Congress through the usual channels of transmission. The report for 1907 stated that the railroad companies were dissatisfied with the order and had modified their distance circulars by excepting to it. Congress made the appropriations as submitted by the department. The reports for 1910 and succeeding years further stated that the railroad companies protested against the use of the new divisor, and that suits had been filed calling into question its validity. In submitting its estimates for appropriations for the years mentioned the department prepared them upon the basis of the application of order 412 in so far as it had been applied from year to year, and Congress made appropriations based thereon.

39 XVI.

The plaintiff has received monthly or quarterly payments, based upon said computation and readjustments, at or about the end of each month or quarter's service, and the payments were received without objection or protest of any kind.

XVII.

Reference is made to the several reports of the Postmasters General for the years 1867 to 1914, inclusive; to Preliminary Report and Hearings relative to Railway Mail Pay before Joint Committee of Congress, January, 1913, to April, 1914, pages 1023, 1024; also to the acts of Congress appearing in the appendix to these findings.

XVIII.

If instead of using a divisor of 105 there had been used a divisor of 90, and to the average weights thus found the maximum rates allowed by law be applied, the difference between the amount so resulting and what was paid plaintiff is $1,257,630.36.

*Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is accordingly dismissed. (See opinion and concurring opinions filed herewith in cases Nos. 31227, 31304, and 32852.)

40 V. *Appendix.*

Act of 1873.

The act of March 3, 1873, 17 Stat. L., 558, appropriates for the service of the Post Office Department "out of any moneys in the Treasury arising from the revenues of said department, in conformity to the act of July second, eighteen hundred and thirty-six"

(5 Stats., 80), "For inland mail transportation, fourteen million eight hundred and forty thousand and twenty dollars," and makes appropriations for messengers, route agents, mail-route messengers, local agents, letter carriers, etc., and then follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary; Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned ,to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct; Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under any provision of this act: Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty feet cars; and fifty dollars per mile per annum for fifty-five feet to sixty feet cars: And provided also,
41 That the length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provides that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation

of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates,' be, and the same is hereby, repealed."

## Act of 1875.

The act of March 3, 1875, 18 Stat. L., 341, appropriates $17,548,000 for inland mail transportation.

"And out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy-three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

## Act of 1876.

The act of July 12, 1876, 19 Stats., 79, appropriates for inland mail transportation, separating other than railroad routes from the latter, and—

"For transportation by railroad one million one hundred thousand dollars: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress at the commencement of its next session such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and
42 expedient, and enable the department to fulfill the required and necessary service for the public. And to defray the expense of said commission the sum of ten thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Act of 1877.

By the act approved March 3, 1877, 19 Stats., 385, this commission was continued.

Act of 1878.

The act of June 17, 1878, 20 Stats., 142, appropriates—

"For transportation by railroad, nine million one hundred thousand dollars; * * * And provided further, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

Act of 1905.

The act of March 3, 1905, 33 Stats., 1088, appropriates for inland transportation by railroad routes $40,900,000, of which $120,000 may be employed for other purposes mentioned—

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Act of 1906.

The act of Congress approved June 26, 1906, 34 Stats., 467, 472, 473, appropriated $43,000,000 for inland transportation by railroad routes for the fiscal year ending June 30, 1907, and provided:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

Act of 1907.

The act of March 2, 1907, 34 Stats., 1212, appropriates—

"For inland transportation by railroad routes, forty-four million six hundred and sixty thousand dollars.

43 "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

44 VI. *Opinion of the Court by Campbell, Ch. J., and Concurring Opinions by Booth, J.; Barney, J.; Downey, J., and Hay, J., Decided March* 11, 1918.

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS

v.

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY

v.

THE UNITED STATES.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

v.

THE UNITED STATES.

THE SEABOARD AIR LINE RAILWAY COMPANY

v.

THE UNITED STATES.

Divisor Cases.

*Opinion.*

CAMPBELL, Chief Justice, delivered the opinion of the court:

These suits were brought to recover compensation for mail transportation alleged to be due the parties respectively, and have been

heard together. A large number of similar cases were taken upon submission when these were heard. The questions involved are substantially the same as those in Chicago & Alton R. R. Co., 49 C. Cls., 463, and Yazoo & Mississippi Valley R. R. Co., 50 C. Cls., 15. The two latter cases were appealed to the Supreme Court, where they were affirmed by an equally divided court. That ruling is not an authority for the determination of other cases. Hertz v. Woodman, 218 U. S., 205. It does not follow, however, that the decisions of this court must be ignored by the court itself when similar cases are again presented. The court should have some regard for its own decisions, and in class cases where though the plaintiffs can not appeal or where the defendants do not appeal the court adheres to its ruling and refuses to reconsider cases subsequently presented that are governed by the former decisions. These considerations could very well justify the court's disposition of the instant cases without an opinion. The plaintiffs, however, are entitled to findings of fact because the amounts claimed are sufficient to authorize appeals. It was therefore decided to hear the parties again in argument, and certain typical cases have been prepared with the view to presenting all of the questions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the right of plaintiffs to recover.

45 As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

These suits were brought in the years 1911, 1912, 1913, and 1914, respectively. In some of them objection was made to Order 412 hereafter mentioned; in some of them no objection to the order was made. To each of the objections reply was made by the Postmaster General to the effect that no contract would be made which excluded a full observance of the rules and regulations, and at that time Order 412 had been promulgated. The respective adjustment notices which later followed had not been issued; all of the plaintiffs received and transported the mails and were paid therefor periodically according to the terms of Order 412 and the readjustment notices issued by the Postmaster General and without objection or protest when payments were accepted.

The objections or exceptions to Order 412 were general. There was no separate objection based upon a supposed injustice to 6-day routes. The contracts were with the different plaintiffs who operated both classes of routes and contracted for both alike.

The claims may be classified as being (1) claims of what are called 6-day routes, (2) claims of 7-day routes, (3) claims of a railroad on parts of whose line are routes affected by the land-grant act.

An illustration of the claims asserted by some 7-day routes under a supposed implied contract may be taken from a typical route as follows: The mails were actually weighed on the route for 105 days,

which included 15 Sundays. The total of the 105 weighings (making the dividend) was divided by 105, and the daily average weight was found to be 143,314 pounds. The maximum statutory rates were applied, and the annual compensation was ascertained to be $305,253.67. This sum was paid in monthly installments, which, as they severally matured, were received by the carrier without objection of any kind.

If instead of using 105 as the divisor 90 had been used, the daily average weight would have been 167,199 instead of 143,314 as actually found.

Assuming that the actual average weight found by 105 as the divisor fairly represented the actual weight carried each day throughout the year, it would appear that on said route there was actually transported during the year of 365 days something over fifty-two million (52,000,000) pounds of mail, whereas if 90 had been used as the divisor the carrier would have been credited with transporting during the year about sixty-one million pounds, making a difference between what was thus actually carried and what by the use of the divisor 90 would appear to have been carried of about nine million pounds of mail. If the basis adopted was 313 days per year the difference in the weights under like computations would be approximately seven and a half million pounds. The difference between what the carrier was paid and what it would have received if its compensation had been based upon the result of using 90 as
46 the divisor and the maximum rate would have been about $46,000 per year. This amount for each of the years in suit is claimed. The actual weight of the mails carried during the year is not shown except by taking the actual average weight per day found as above and multiplying it by 313 or 365 days. The actual weight can not be approximated otherwise.

The action is based upon contract, and plaintiff, denying there was an express contract, relies upon implied contract for recovery as upon quantum meruit. It has been paid the maximum rates provided by law for the average weight of mails actually carried. Can it recover under an implied contract as upon quantum meruit for the nine million pounds of mail which it did not in fact carry and thereby receive $46,000 per year additional to what it has received?

A contention advanced, however, by plaintiffs is that the law required the use of a "divisor of 90."

Two propositions may be regarded as settled:

(1) That the railroad companies were until the act of July, 1916, free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. Thus it was held in Alabama Great Southern Railroad case, 25 C. Cls., 30, 41, decided in 1889, in an opinion by Judge Nott, that railroads other than land-grant roads "are under no obligation to the Government to carry the mail and may decline the service if they will, but that if they do perform, it must be upon the terms and conditions prescribed by the statutes and regulations of the Post Office Department or under an express contract within the limitations imposed by law." This case was affirmed by the Supreme Court, 142 U. S., 615.

In Eastern Railroad Company, 129 U. S., 391, 395, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. * * * We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars."

In Chicago, Milwaukee & St. Paul Railway Company, 198 U. S., 385, 389, it is said:

"A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department."

To the same effect is Minneapolis & St. Louis Railway Company, 24 C. Cls., 350, and Texas & Pacific Railway Company, 28 C. Cls., 379.

In L. & N. Railroad Company, 46 C. Cls., 267, 277, it was declared that the Post Office Department had no authority to compel the company to transport the mail upon terms to which it had not agreed. Delaware, L. & W. Case, 51 C. Cls., 426.

(2) The rates stated in the statutes were maximum rates.

After the amendatory acts of 1876 and 1878 herein mentioned were passed a suit was brought in this court involving the construction of said acts, and in the opinion delivered by Judge Richardson (Eastern Railroad Company Case, 20 C. Cls., 23, 41) it was said:

"Section 4002 of the Revised Statutes, from the act of 1873, does not establish an absolute rate of compensation, necessarily
47 alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a discretion to make contracts at less rates if he should be able to do so. On that point the language of the section is clear—'the pay per mile shall not exceed the following rates.' It is urged that this language is controlled by the preceding words of the section, 'The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned.' In our opinion the rates there referred to are any rates which the Postmaster General may contract for, not exceeding those thereinafter mentioned."

This case was decided January 12, 1885, and upon appeal was affirmed by the Supreme Court February 4, 1889, 129 U. S., 391, 395. In the Supreme Court's opinion, delivered by Mr. Justice Harlan, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the act of 1876."

Again, in 1889, this court, speaking through Chief Justice Richardson, in Minn. & St. L. Ry. Co. Case, 24 C. Cls., 350, said (p. 361):

"In the Eastern Railroad Case (20 C. Cls., R. 41), affirmed on

appeal (129 U. S., 391), we held that the statute (Rev. Stat., §4002) did not fix the exact amount to be allowed to railroads, but only the maximum which the Postmaster General could not exceed, leaving to him a discretion to make contracts in his own way at less rates if he should be able to do so."

And again, in 1893, in the Texas & Pac. Ry. Co. Case, 28 C. Cls., 379, it was said (p. 389):

"It seems to be assumed by the claimant that the statutes fix an absolute rate of compensation, while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify."

In A. G. S. R. R. Co. case, 25 C. Cls., 30, 43, decided in 1889, this court, speaking through Judge Nott, and with reference to the portions of a railroad that were land-aided, said:

"But as to these latter portions of the road it was unquestionably within the power of Congress to set a limitation upon the price which should be paid for such service, and thereby to leave the public agent, the Postmaster General, without authority to bind the defendants for any greater price, either by entering into an express contract or by accepting the claimant's services without one; and it was equally within the discretion of Congress to fix different rates for different roads or classes of roads, and in so doing to say that if part of a mail carrier's line was a land-grant road the remainder of the line should be restricted to the same compensation. Such a restriction would not bind the carrier to carry the mail, but it would bind the Postmaster General not to incur a greater liability, and would be notice to the road at what point his authority to bind the Government by contract terminated."

48 In Jacksonville, Pensacola & Mobile R. R. Co. case, 21 C. Cls., 155, decided in 1886, and affirmed by the Supreme Court (118 U. S., 626), it is recognized that the rates mentioned in the statute are maximum rates.

In A. T. & S. F. Ry. Co. case, 225 U. S., 640, the court construed a provision of the act of March 2, 1907, 34 Stats., 1212, which provides additional pay for railway post-office cars "at a rate not exceeding" designated sums for different lengths of cars. That act was an amendment of section 4004 Revised Statutes in that it changed the maximum rate stated and made some change with reference to the sizes of the cars mentioned in the earlier act. The terms "at a rate not exceeding" are the same in both acts, and section 4004 is in the same language as the second proviso in the act of 1873. The Supreme Court held "The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate not to exceed the statutory maximum." If the language of said proviso to the act of 1873 only fixed a maximum rate, it is difficult to see how the language in the same statute that the pay per mile per annum "shall not exceed the following rates" is to be given a different meaning.

That the rates were "specified maximum rates" was recognized by the Supreme Court as early as 1881 in Chicago & N. W. Ry. Co.,

104 U. S., 680, 683. That they were maximum rates is declared by Revised Statutes, section 3999, providing for the contingency that the Postmaster General may not be able to contract within the prescribed maximum rates.

We think it is too late to question the rule stated.

First. It is said in one of the briefs for plaintiffs, speaking of the act of March 3, 1873, 17 Stats., 558, that it "plays the most important part in this case." But that act is not to be considered independently of the balance of the law when we come to construe its meaning.

The act of June 8, 1872, 17 Stats., 283, entitled "An Act to revise, consolidate, and amend the Statutes relating to the Post Office Department," deals comprehensively, as its title imports, with the powers, duties, and responsibilities of that department. It was referred to in the opinion of this court in the Chicago & Alton case and we now mention some of its provisions with more particularity. It contains more than 300 sections and embodies the statutory law relating to the Post Office Department, with perhaps a minor exception not material here. By its repealing clause (sec. 327) it repeals "the following acts and parts of acts and resolutions and parts of resolutions," and there follows a list of the acts and resolutions wholly or partly repealed, beginning with section 2 of the act of March 3, 1791, and concluding with the act of April 27, 1872. Included in the repealed statutes are the act of July 2, 1836, 5 Stat., 800, the two acts of March 3, 1845, 5 Stats., 732, 748, and section 8 of the act of March 3, 1845, 5 Stats., 752. It provides for the establishment of "a department to be known as the Post Office Department," the principal officers of which "shall be one Postmaster General and three Assistant Postmasters General," to be appointed by the President, by and with the consent of the Senate. The term of office of the Postmaster General is "for and during the term
49 of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

After prescribing in particular some of the duties of the Postmaster General, the act of 1872 provides (sec. 6) that he shall generally superintend the business of the department and execute all laws relating to the postal service.

By section 388 of the Revised Statutes of 1873 it is provided "That there shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof."

Among other provisions of the act of 1872 the following appear:

Section 46: "That the money required for the postal service in each year shall be appropriated by law out of the revenues of the service."

Section 210: "That the Postmaster General shall arrange the railway routes on which the mail is carried" * * * "into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service per-

formed." This differs from its predecessor, the act of 1845, in the order of terms and in the introduction of the word "frequency," which did not appear in the act of 1845.

Section 211 provides the maximum pay for the several classes of routes "per mile per annum."

Section 212: "That if the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," he may make other arrangements for carrying the mails.

Section 213: "That every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

Section 214 provides that all railway companies which have been aided by a grant of land or otherwise "shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

Section 256: "That no contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Section 265 authorizes the Postmaster General to enter into contracts for carrying the mails with railway companies without advertising for bids therefor, and further authorizes him to allow any railway company "with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates."

Section 200: "That all the waters of the United States shall be post roads during the time the mail is carried thereon."

Section 201 provides "That all railways and parts of railways which are now or hereafter may be put in operation are hereby declared to be post roads"; and by sections 202 and 203 canals and plank roads during the time the mail is carried thereon are declared to be post roads.

All of these sections were carried into the revision of 1873 and constitute sections 3997 et seq. and section 3964 and sections 3942 and 3956 of the Revised Statutes, the latter authorizing contracts with railway companies without advertising for bids and declaring that no contract for carrying the mails shall be made for a longer term than four years.

Provision is made (sec. 212, act of 1872; sec. 3999, Rev. Stats.) for the contingency that the Postmaster General may be unable to contract for the carrying of the mail on any railway route at a compensation "not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," and he is authorized to contract with others for the service upon the happening of such a contingency. It is manifest that this section, being an authority to a public officer to contract with the railway companies within the maximum rates fixed by the act, "or for what he

may deem a fair and reasonable compensation," was something more than a mere authority conferred on him, because the words just quoted are sufficient, when addressed to a public officer, to impose upon him the duty of exercising his judgment as to the reasonableness and fairness of the compensation which he proposes to pay.

It is not necessary when inquiring into the powers and functions of the Postmaster General under such an act as that of 1872 or the revision of 1873 to find expression in explicit terms of all his rights and powers and duties. An applicable rule in such case, stated in one of the plaintiff's briefs and in the Government's brief as well, is as follows:

"A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must me done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future." United States v. Macdaniel, 7 Pet., 1, 14.

Aside from that rule it is plainly deducible from the terms of the statute that there was devolved upon the Postmaster General the duty of contracting with railway companies on terms within maximum rates and that it required of him the exercise of broad discretion in matters pertaining to the transportation of the mails. In
51 theory at least the expenses of handling the mails by the department were to be borne by its revenues. Rev. Stat., sec. 4054. These were to be covered into the Treasury and the expenses were appropriated for by Congress out of such revenues. From the earliest period the carrying of the mails was under contract, and the act of 1872 made no change in that regard except in the case of land-aided roads. Their duty to transport the mails arose from the statutes granting them aid.

When therefore we come to consider the meaning of the act of March 3, 1873, we must treat it not as a separate and distinct piece of legislation but in connection with the law then upon the statute book, of which, when enacted, it became only a part. By its enactment some material changes in the existing law were made, and those are to be ascertained from a proper consideration of the entire law. Repeals by implication are never favored. Where there is incon-

sistency between the provisions of the new law and those of the old effect should be given to both if it reasonably may be, and unless there be a positive repugnancy the old law is only repealed by implication pro tanto to the extent of the repugnancy. Wood's case, 16 Pet., 342, 363; Tynen's case, 11 Wall., 88, 93.

Some significance attaches to the fact that the Congress enacted in the revision of 1873 so many of the provisions of the act of 1872 and incorporated therein at the same time the act of 1873, and to the further fact that those provisions have continued as part of the law. The act of July, 1916, 39 Stats., 425, marked a distinct departure from prior law.

As already stated, the revision of 1873 made the Postmaster General "the head of an executive department," thereby enlarging the first section of the act of 1872. It also by section 4003 made an important change in the proviso from which that section is taken in the act of 1873. The latter act provided that "in case any railway company now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provision of this act," while section 4003 forbids any increase of compensation under the provisions of "the next section," which provides an increase for the use of the cars. These provisions are in the law because of the adoption of the revision of 1873.

The authority and duty of the Postmaster General to make contracts with railway companies, the provision that no contract for carrying the mails "shall be made for a longer term than four years," the right of the Postmaster General to discontinue service on any postal route, the classification of railway routes and the maximum pay therefor, the duty of the Postmaster General to make contracts with others where he can not contract within the maximum rates provided by the statute or "for what he may deem a reasonable and fair compensation," and other provisions of the act of 1872, have been continued as a part of the statutory law along with the act of 1873.

The act of 1845 had directed that the Postmaster General arrange and divide the railroad routes into three classes according to the size of the mails, the speed with which they were to be conveyed, and the importance of the service, while section 210 of the act of 1872 (sec. 3997 Rev. Stats.) provided for arranging the railway routes into three classes according to the size of the mails, the speed at which they are carried, and the "frequency and importance of the service," so that all railway companies shall receive, as far as practic-
52 able, a proportionate and just rate of compensation, according to the service performed. The "equal and just" rate of compensation mentioned in the act of 1845 gives way to just and proportionate rate in the act of 1872.

The act of 1873 appropriates for an increase of compensation, and provides that the Postmaster General readjust the compensation to be paid for the transportation of the mails on railroad routes "upon the conditions and at the rates hereinafter mentioned," said conditions being, first, that the mails shall be carried with due frequency and speed and that a suitable car be provided, and, second, "that the

pay per mile per annum shall not exceed the following rates." (Sec. 4002, Rev. Stats.)

Due frequency and speed and the furnishing of certain cars were conditions, and what should be due frequency and speed, and what the character of the cars, were left largely in the first instance to the determination of the Postmaster General, but being "conditions" it is clearly implied that the matter should be consummated by an agreement of the parties.

Whether in putting in operation the act of 1873 the Postmaster General could have continued to classify the routes into three classes as provided by section 3997 of the Revised Statutes we need not stop to inquire. The authority to do so having been continued, it can not be positively affirmed that the act of 1873 prevents it. It certainly can not be affirmed that the act of 1873 is inconsistent with all of the provisions of section 210 of the act of 1872 (sec. 3997, Rev. Stats.), which, as stated, still stands upon the statute book as declaring the purpose that some distinctions be made "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." The observance of that purpose necessarily involved the exercise of judgment and discretion by the Postmaster General. Nor is there any doubt that the Postmaster General when he first came to apply the act of 1873 made a distinction between at least two general classes of railroad routes, namely, those carrying mails six and seven days, respectively, having regard to the speed and frequency with which they were carrying the mails as well as to the character of the service performed. The law vested in him full discretion to do that, and the right and duty to exercise that discretion necessarily continued in the office of the Postmaster General. The discretion being vested by statute its exercise by one or more officials could not prevent its exercise by a succeeding one. Macdaniel's case, 7 Pet. 1, 14.

Nor did the act of 1873 repeal section 212 of the act of 1872 (sec. 3999, Rev. Stats.), which imposed a duty on the Postmaster General to contract for the transportation of the mails for a compensation within the maximum rates allowed by law or for less than the maximum rates if his judgment dictated that a reasonable and fair compensation would be less than the maximum. The act of 1872 had provided certain maximum rates to be paid "per mile per annum" and the act of 1873 declared that the "pay per mile per annum shall not exceed the following rates."

We are told that some years prior to 1873 the question of classification of the railroad routes with reference to "the size of the mails" and the other provisions of the law had been a matter of
53 difficult application and that the Postmaster General had originated a plan by which he called upon the railroad companies to furnish statements of the weights of the mails being carried, and to that end they were asked to weigh the mails for 30 consecutive working days. This they did in many instances, but at times they failed to do so. They weighed the mails being carried

on 6-day routes for the 30 days during which they were carried, and they weighed the mails on the 7-day routes during a period of 35 days. In both instances they reported as the average the totals divided by 30. These returns were made the basis of adjustments by the Postmaster General where differences arose in the matter of settlements.

The importance of a change whereby the indefinite term "size" of the mails and other features requiring his judgment would be put in more definite form was called by the Postmaster General to the attention of Congress. We are told that the act of 1873 originated in his office and was intended to effectuate the plan he had conceived for making weight rather than size the basis of compensation. If it was intended to give concrete expression to a requirement that the mails should be weighed in the cases of the two classes of roads for 30 and 35 days, respectively, and the dividend in both cases be divided by 30, the language of the act falls short of making it so. It calls for an average and indicated the number of weighings, and hence literally the divisor is the number of weighings and the dividend is their sum. It limited the number of weighings to not less than 30 and left for the determination of the Postmaster General the number of successive working days on which the mails were to be weighed. It required weighings at least once in four years and left it for the Postmaster General to determine whether they should be conducted oftener. The times when they should be made and their frequency were not fixed by the act. If the act was a departure from the classification contemplated in the prior law, it did not prescribe in terms what differences should be made between routes performing different service. It was known to Congress that some routes were carrying the mails for 7 days a week, some for 6 days a week, and others for a less time. The relative proportion of 7-day routes to 6-day routes was about one to seven.

While making frequency and speed conditions upon which contracts would be made, the act did not in terms withdraw the injunction in section 210 of the act of 1872 (3997, Rev. Stats.) that contained the legislative expression of the reason and purpose of classifying the railway routes, and its proper observance rested in the discretion of the Postmaster General.

While section 210 of the act of 1872 provided maximum rates for three classes, the act of 1873 provided a graduated scale of maximum rates based upon average weight. It left, however, the adjustment of rates to intermediate weights in the hands of the Postmaster General.

Many features in the act of 1873 rest for their practical operation in the judgment and discretion of the Postmaster General. Some of these are stated in Chicago & Alton case, p. 507, and others are found in other parts of the law.

When the Postmaster General came to apply the law he found that the mails were being transported by different railroads for different numbers of days per week, some for 7 days, others for 6,
54 and yet others for fewer days. The indicated purpose of the law relating to classification was that the different roads

should receive, as far as practicable, a just and proportionate compensation, according to the service performed, and due frequency and speed were conditions entering into the contemplated readjustments. The rates mentioned were limited to designated standards, and the intermediate weights falling between these standards could only be compensated for upon schedules left to the Postmaster General to adjust.

As to those intermediate weights he had discretion, because he could prescribe greater or less rates within the stated standards by making the proportion greater for the smaller intermediate weights than for the larger ones, or he could do the reverse.

The term "weight" had superseded the term "size" in the prior law, but actual weight could not be had without constant weighings, which were impracticable. The average weight carried became therefore the basis upon which the Postmaster General could contract if the railroad companies would agree. An actual average of 30 different weighings would not in the very nature of things show the actual weight transported because it changed (generally increasing) during the year, and the disparity became greater in proportion to the length of the contract term. The weighings were not confined to a given number of days but were to be for not less than a stated number.

The policy of Congress, as indicated by its general legislation on the subject, had been to leave the handling of the business in the Postmaster General's hands under such limitations as they saw fit to prescribe. His duties and his authority (sec. 6, act of 1872) were in a general way defined, among them being that he should "generally superintend the business of the department." In the revision of 1873 the department appears as one of the executive departments, and the Postmaster General is made the head of it. That the affairs of the Post Office Department bear more analogy to a large business enterprise than to a function of Government is apparent. That in the conduct of it much is and must be necessarily left to the judgment and discretion of its superintendent is also apparent. When, therefore, he found that the act of 1873 provided for an average weight of mail, according to which compensation was to be readjusted and under which contracts for their transportation should be made, was the law under which he was to act mandatory or directory merely? By directory provision it is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them. Hubbert v. Lumber Co., 191 U. S., 70, 76, De Visser case, 10 Fed. 642, 648.

Whether an act is directory depends upon the sound construction of its nature and object and of public convenience and apparent legislative intention. If it be merely directory, a deviation from it may subject the official to responsibility to the Government, but can not be taken advantage of by third parties. Bank v. Dandridge, 12 Wheat., 64, 81.

In Martin's case, 94 U. S., 400, the court held that the eight-hour law of 1868 was a mere direction by the Government to its agent, and did not affect the right of contract. This court has said in effect in an opinion by Judge Barney that the act was merely
55 directory. New York, N. H. & H. case. When the daily average was found by either method it was not controlling upon the roads because they could refuse to contract or transport the mails at all. If the act was mandatory a mathematical average would result and the proposed terms could be adjusted within the maximum rate provided the carriers agreed. If the law was directory or permissive a method to be found by the Postmaster General could be adjusted to actual conditions. If he assumed that the rates were fixed or could be enlarged, he was plainly in error, because the courts have held otherwise. If the act was mandatory it marked a departure from the policy of Congress as regards the conduct of this great business enterprise. It had directed a classification to be made so that "as far as practicable" just and proportionate compensation could be made, according to the service performed.

That the act was directory seems to have been the view adopted by the Postmasters General in the early stages of its application, because the defense of the usage in 1885 was based upon the justice of the practice then in vogue and not upon the absolute requirements of the law. Nor could they plainly read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30. Speaking as it did of a number of weighings, not less than 30, and using the word "average," a literal application of the terms would call for a dividend made up of the sum of the terms in the divisor, and therefore for an actual average; but treating it as directory would authorize what may be called a permissive average deemed just to the Government and the railroads.

It was materially supplemented in that regard by the act of 1875. By treating it as directory the long-continued usage of the department and the recognition thereof in the repeated appropriations by Congress can be supported. Being directory, it was left to the judgment of the Postmaster General, under such instructions as he considered just to both parties, to ascertain the daily average weight by some other than a mathematical rule. The power was not to be arbitrarily or capriciously exercised, and ample protection against that kind of action could be found in the right of the railroad companies to decline to accept the average as found by refusing to transport the mails or in the course suggested in Jacksonville R. R., 118 U. S., 626, 628. And see Martin's case, 94 U. S., 400. It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration can not be

prevented by parties whose claims arise after full notice of the change. Macdaniel's Case, 7 Pet., 1; Alabama Great Southern R. R. Case, 142 U. S., 615.

When the Postmaster General came to apply the law he called upon the railroad companies, who were then conducting the
56 weighings, to report the weights to him in accordance with the plan he had originated. The practice followed was to weigh the mail on 6-day routes for 30 days and on 7-day routes for 35 days. The Sunday weights on the 7-day routes were reported as part of the Monday weighings. The totals in both cases were divided by 30 and the quotients were accepted as the average daily weight. This daily average weight on the 6-day routes was thus an actual average, and that on the 7-day routes may be called a permissive average. Very generally the maximum rates prescribed by the statute and by the schedule of rates applicable to intermediate rates as formulated by the Postmaster General were applied to the daily average thus ascertained. If the law required an actual average in all cases it is plain that by the method adopted the 7-day routes were credited with more average weight of mail than they carried, and were therefore paid more than an actual average of their weights would have justified within the maximum rates prescribed by law, a course that can be justified only upon the assumption that the average to be ascertained under the law was not an actual average, but such an average as having regard to the other provisions of the law, the Postmaster General might adopt. That Congress was informed of the method adopted, and by repeated appropriations to meet deficiencies and appropriations based upon these estimates, which in turn were based upon said method, may well be taken as admitting that the Postmaster General's action was satisfactory to them. They appear to have been equally satisfied with the results of Order 412. They did not change it.

Within less than two years after the act of 1873 went into effect, the act of March 3, 1875 (18 Stats., 341), was passed. That act, we may assume also originated in the Post Office Department. It provided for a change in the conduct of the weighings and required them to be made by employees of the Department. It carries a provision which we think is of importance in this connection. The prior act had required that the result of the weighings by railroads "be stated and verified in such form and manner as the Postmaster General may direct," while the later act directed that the Postmaster General "have the weights stated and verified to him by said employees *under such instructions as he may consider just to the Post Office Department and the railroad companies.*" [Italics ours.] We do not think that the full force of this expression is found in the suggestion that it merely authorized him to devise some just plan "for obtaining the gross weights," because it is to be assumed that he would have done that anyway. The studied phraseology of the act indicates a broader purpose. It mentions "such instructions as he may consider just to the Post Office Department and the railroad companies" with reference to having the weights stated and verified to him. The Postmaster General by the plan adopted had credited

the 7-day routes with possibly one-sixth more than the actual average weight being transported. That he supposed he had the authority may be assumed from the fact that he so exercised it. And it is conceivable, at least, that he would desire a more concrete expression of legislative authority to continue the practice. Chicago & Alton Case, page 516. The act of 1875 may be accepted as authorizing instructions such as were given, whereby the Sunday weights were reported with the Monday weighings. The authority to give
57 such instruction as he might consider just necessarily involved the exercise of judgment and discretion. We see no reason why in the terms of the act of 1875 may not be found an escape from the literalism of the act of 1873, if it is not found in other provisions of the law, because we find that as late as 1884 the Postmaster General, in submitting the question to the Attorney General and stating the method of ascertaining the average weights, said: "The weight on the Sundays being treated as if carried on Mondays." Such, then, were his instructions, because he considered that course just to the Government and the railroads. But that is not to say that the method pursued was mandatory upon the Postmaster General. The fact that he could give instructions involved the right to determine what the instructions should be, and what would be "just" was for his determination. The determination of it at one time, or by one or more Postmasters General, did not affect the right of others to give other instructions and to find that another course was just. The weighings every four years or oftener required, as they occurred, an observance by the then Postmaster General of the injunctions of the law.

The acts of 1876 and 1878 directed a reduction in the rates, and they were accordingly applied. It was under these acts that the cases arose wherein this court determined that the rates mentioned were maximum rates. They did not affect or establish the divisor.

No further legislation occurred affecting the questions until the act of 1905, which provided that the mails should be weighed for not less than 90 successive working days. Except for the change from 30 to 90 the act of 1905 uses the language of the act of 1873. If literalism be indulged, the language would seem to indicate a change rather than a confirmation of an existing method, but we think the correct view is that Congress still left the discretion of the Postmaster General unimpaired. That law did not make permanent or obligatory any divisor.

The next act was that of March 2, 1907, which changed the rates with reference to roads carrying upward of 5,000 pounds of average weight of mails per day. That act did not affect the method of ascertaining the average. Its requirements are met when, to the average ascertained according to a directory statute, the proper rates were applied, the railroads having still the right to refuse to contract at all.

On June 7, 1907, the Postmaster General issued Order 412, which provides "That when the weight of mails is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." No

attempt to apply this rule to existing contracts was made. The rule was intended to be and was applied prospectively in the several contract sections as the quadrennial weighings occurred. We do not find that this rule is subject to the objections which the plaintiffs have urged against it.

Turning now to the contentions of the plaintiffs:

(*a*) That the railroads were by statute declared to be post roads. No significance attaches to that fact in these cases.

The same statutes declare that canals and plank roads shall be post roads. It has been correctly stated that the establishment by law of all railroads as post roads means nothing more than that
58 the mails could and might be carried over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake, without the consent of the railroad companies and without making compensation therefor, to require any railroad company to transport the mails over its lines. Atlantic & Pacific Telegraph Co., 2 Fed. Cases, 632; State of Pennsylvania v. Wheeling, 18 How., 421, 441. Post roads and post routes are not synonymous terms. Blackham v. Gresham, 16 Fed. Rep., 609, 611; Congress declares what are post roads, and it requires action by the Postmaster General to authorize railway postal routes.

(*b*) That what is called the long-continued departmental construction of the act of 1873 is controlling.

It was stated in the Chicago & Alton case, page 492, that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great respect; and ought not to be overruled without cogent reasons and may be accepted as determining its meaning. By accepting the view above stated, that the law was directory, and not mandatory with reference to the ascertainment of the average weights, we can find support for the departmental usage that was so long continued. If, on the other hand, the act was mandatory and literal it was not pursued correctly. "It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule than the one now under consideration." Macdaniel's case, 7 Pet., 1, 14. Such is the rule where the change is made prospective and is not given a retroactive operation. The claims asserted here arose after the Postmaster General had changed the order, and they are in no sense rights vested or accruing under a former construction or usage of the department. The distinction is illustrated by Macdaniel's case, where an employee of the Navy Department was held entitled to certain compensation, because he had rendered services under a construction which obtained during the time of the service. He was not claiming under the changed construction, but his rights arose during what may be called the erroneous construction. The distinction is also noted in Alabama Great Southern Railroad Co. case,

142 U. S., 615, 620, where the general rule contended for by plaintiffs is stated, and it is said that the courts will look with disfavor upon any sudden change whereby parties "who have contracted with the Government upon the faith of such construction may be prejudiced"; and it stated further: "It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the payment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government." The construction or usage "must be considered binding on past transactions." Macdaniel's case, supra, page 15.

In Midwest Oil Co. case, 236 U. S., 459, the Supreme Court, three justices dissenting, held that the long-continued practice by the Chief Executive of withdrawing public lands sustained the
59 right to do it in the particular case, though there had been no statute authorizing it. Referring to the cases of continued practical construction it was said, page 473: "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land-grant act." "Nor do these decisions mean that the Executive can by his course of action create a power." The court held that a long-continued exercise of the authority was sufficient to sustain action after it had been taken as against parties whose rights arose thereafter, but it was not held that the rule was mandatory and could not be departed from. Nor indeed can it be stated that the rule is so general as to be applicable in all cases involving departmental action because a principle inhering in our system is that it is a government of laws. It would be a strange conclusion to reach that departmental usages founded on its own construction of the statute can not be changed by the same authority which gave them birth. The Congress may enact a law which they can amend or repeal; the courts may construe a statute and modify or overrule their decisions. Is the executive branch alone so hampered that it may not modify or change the construction or the usage or practice or methods it may have adopted when such modification or change is given a prospective and not a retroactive operation and when the claims asserted did not arise until after the usage is changed, and particularly when the usage originated in the exercise of a directory authority?

(c) It is, however, further contended by plaintiffs that their view does not rest solely upon departmental construction, but that it is also sustained by the effect to be given to the passage of the act of 1905 as well as of the acts of 1876 and 1878. Particular stress is laid upon the acts of 1905 and of 1907.

Exception is taken in one of the briefs to the statement in the Chicago & Alton case (p. 512) that "it is evident that Congress was not satisfied with the average weights being obtained, whether the dissatisfaction arose from the method or the result, and they therefore changed the law to insure a more satisfactory average." It can not be denied that under the terms of the act of 1873 the Postmaster

General could have weighed the mails for 90 days, more or less, because that act called for weighings for "not less than 30 successive working days." When, therefore, we find a direction in the later act that they shall be weighed hereafter for not less than 90 successive working days, it must be concluded that Congress had a purpose in making the change. If satisfied with the results under the prior law, why enact the later one? If the exception be to the use of the word "method" in that connection it may be conceded that it was not essential to the thought conveyed. It was in effect, if not in words, held that the act of 1905 was not a legislative adoption of the prevailing method for ascertaining the daily average weight and if Congress did not have that method in mind it would seem that the act had no bearing on the question of a fixed divisor one way or the other, since there is nothing in its language to show that they had. Our view of the meaning of the act of 1905 is that it did not affect the powers of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than 90 successive working days. We might upon that point accept the statement found on different briefs as follows: "This act changed neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of 1873;" or

That the act "means the same thing in every particular that the act of 1873 meant, whatever that was"; or

That "it lengthened the period for demonstration by weighing but made no change in the elements to be considered nor in the manner of their use or combination"; or

"This act of 1905 did nothing more than make the weighing period include 90 instead of 30 working days."

If, on the other hand, its purpose was to require "a longer period of weighing by which to get, as was supposed, a fairer average of weights," it certainly authorized the official charged with that duty to adopt a method which would accomplish the desired result. The fact that when the act was upon its passage in the House the chairman of the committee changed the language of the bill as reported so that "there could be no question of the construction that can be made of the law" merely confirms the view that the act was not intended to change the law except as to the number of weighings. In fairness it should be stated that plaintiffs did not by the expressions quoted intend to concede our interpretation of the act of 1873, but they can not find in its terms a positive mandate to pursue the course adopted by the department, and they must have recourse to what is termed the long-continued departmental construction or legislative adoption thereof. Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does nor confer the power of legislation, nor can the exercise of the power have the effect of legislation. United Verde Copper Co., 196 U. S., 207, 215. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. He must read the law and must, therefore, in a certain sense construe it in

order to form a judgment from its language what duty he is directed to perform. Roberts' case, 176 U. S., 221, 231. There is, however, a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. With respect to the former the courts are without power to control executive discretion, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts. Noble v. Union River Logging Co., 147 U. S., 165, 171. We think the course pursued was a matter of usage or practice rather than of construction and finds its support in whatever discretion the act of 1873 vested the Postmaster General with, taken in connection with other provisions of law, supplemented by the act of 1875 authorizing such instruction as the Postmaster General deemed proper. It appears that in "a documentary history of the railway history from its origin, in 1834," which was transmitted to Congress in 1885 by the Postmaster General it was stated that while there had been some little controversy at one time "as to the justness of the present method" of obtaining the daily average weights a little examination would show that "no other way of proceeding could be so just as that now in vogue."
61 Thus it was because he and his predecessors thought that the method was just to the railroads and the Government that he adopted the usage. Proceeding to state that method it is explained in the history that on the 6-day routes the sum of 30 weighings are divided by 30 and "give the daily average," while on the 7-day routes the "weighing is done for 35 successive days (including Sundays) and the aggregate divided by 30 for a basis of pay." Why a succeeding Postmaster General could not with equal right adopt a method of finding an actual average on 7-day routes and dividing the aggregate of 90 days' weighings on 6-day routes for a basis of pay is not made entirely clear, when it be assumed that in his wise discretion he decided that the new method was just to the department and the railroad companies and had a proper regard for the purposes of the law.

In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years the seven-day routes had increased by about 16 times their number during the same period.

From receiving somewhat more than a third of the whole compensation paid for mail transportation by railroads in 1873 to both classes, the seven-day routes were being paid in 1907 about thirteen times as much as the aggregate of the six-day routes. That is, the six-day routes were being paid approximately three and a quarter millions of dollars per annum in 1907, and the seven-day routes were receiving over forty-one millions of dollars.

Assuming that the weights carried bore some proper relation to the pay received it would thus appear that the seven-day routes (which carried so much smaller aggregate weight in 1873 than six-day routes) were transporting in 1907 many times more weight than the six-day routes were transporting.

The relative positions of the two classes had changed in 1907, as has been shown. The greater mileage and the greater weights appeared on the seven-day routes.

When the Postmaster General laid out his course in 1873, he adopted as a basis for the actual average the six-day routes, they being the more in number and carrying the greater weights. He or some of his immediate successors adopted the same divisor for the seven-day routes "as a basis for pay."

If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it can not be reasonably af-
62 firmed that a fairer average is not attained when, considering all the routes, the basis is laid upon the class which is greatest in number and handles the larger weights.

We are told in one of the briefs that the readjustments of compensation were made upon the basis of "six round trips per week," and it is hence stated that "Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation."

If such be the case, does it tend to support the claim that they be credited each day with an increased average? The theory was that as the seven-day routes carried mail more frequently than others, their daily average should not be actual, and it was increased by the method used. If they voluntarily transported the mails on Sunday, they can not recover for the service; and if they do not contract to do so, why may not the Postmaster General, under such instructions as he may consider just to the parties and within the terms of the law, find the actual average and accordingly agree to pay for what the carrier does contract to carry?

We do not mean to imply that the provision as to six round trips per week means what plaintiffs suggest. The postal laws and regulations provide for deductions for failure to perform trips, and it is probable that the failure to transport the mails as agreed is visited with fines and deductions. The act of 1906 requires as much.

But the contention is that the divisor became fixed by the passage of the act of 1905 because, it is urged, "that the enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction."

The rule stated is found in the Hermanos case, 209 U. S., 337,339, is rested upon the Falk case, 204 U. S., 143, and is repeated in the Komada case, 215 U. S., 329, 396. These cases are mentioned in the Chicago & Alton case. In referring to the Hermanos case it was said that the opinion stated that the contention of the Government that the paragraph under consideration separated distilled wines in bottles into three classes and fixed a specific rate of duty on each and that (1) the court thought the contention was right and needed no comment to make it clear; further, that counsel for the Government "also pointed out" that the tariff act of 1875 and subsequent acts were substantially similar to the paragraph under consideration and that Treasury decisions were in accordance with the interpretation for which the Government contended, and, therefore, it was said, (2) "We have stated that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," citing Robertson v. Downey, and another case, and (3) the rule above quoted is then stated. It was to this third proposition, in its nature distinct from the other two mentioned, that the Falk case is cited. Two of the justices concur "solely because of the prior administrative construction," from which we infer that they did not agree that the first contention of the Government was right and needed no comment to make it clear and hence concurred solely upon another ground, the statement relative to which was in the second proposition, above stated. We repeat these observations not because they are essential to the conclusion we reach but as tracing the history of the
63 rule.

The decisions of the Supreme Court are controlling in this court and their statement that a rule had been announced is authoritative. It is not for us to question the accuracy of their statement, but when called upon to apply a stated rule we must consider the facts of the case to which the rule is sought to be applied, and we may refer to the conditions under which the rule was announced, because the rule is applicable where similar conditions present themselves. In the cases mentioned the court was considering tariff legislation; and, as is well known, the proper application of tariff provisions frequently calls for construction of the law under which those charged with its execution may proceed and the rights of importers become fixed. Their construction does not involve a discretion to do one or another thing, but does involve a positive duty to execute the law. Men direct their business and import their goods in reliance upon an adopted construction. Provision is made for hearings in tariff matters, where an interpretation of the act may be had, and the Treasury decisions are reported. It may be that the statement of the rule is not to be limited by the character of the cases in which it was announced, but we do not think it was meant that in all cases where a statute uncertain in terms is reenacted without change the court must ascertain from the department charged with its execution the construction which that department put upon the prior act. The court is not absolutely bound to give, but may give, the departmental construction a controlling effect. Chicago & Alton

case, page 492. And where a given rule is invoked we may have regard to the reason for it, because, generally speaking, the reason ceasing, the rule itself need not be applied.

We do not think it necessary, however, in these cases to even attempt to qualify the rule stated. In an applicable case we would not feel authorized to do so. The rule does not apply here, because we are concerned with what is called a construction, but which is, we think, a usage that had its origin in the duty of exercising judgment and discretion and not in interpretation of doubtful terms under which rights would vest, or which, if changed, would defeat or injuriously affect those rights. If when authorized to adopt a course which to him seemed just to the Government and the railroads, the Postmaster General could pursue the one or the other method of ascertaining the contemplated average then manifestly the method adopted by one could be altered by another so long as the change was made prospective, because being charged with all the duties imposed by law the succeeding Postmasters General were vested with all the powers conferred by law.

The claims of the plaintiffs arose after the issuance of order 412, and no retrospective effect was given to that order. The right to give instructions as to the weighing was as absolute in 1907 as in 1873.

With the wisdom of the change, so long as the right to make it remained, the court has nothing to do. Wright's case, 11 Wall., 648.

It may be remarked that the expression in the cases of an unwillingness by the court to depart from a long-continued departmental construction of an uncertain or ambiguous act is referable to the court's action, when called upon to construe the law, and they do not in general refer to the right of a department itself to change its construction while giving it a prospective operation.

64 (*d*) That proceedings had in Congress at or before the passage of the act of 1907 were a legislative adoption of the divisor of 30 or a recognition of it as a requirement of law.

The act of 1907 did not affect the method of ascertaining the daily average weight. It reduces the rates, and it may be observed that while legislation has touched in rare instances since 1873 the question of compensation, it has uniformly been in the direction of reducing it, except in a limited way as the act of 1907 may affect land-grant roads. Only once since 1873 has legislation referred in terms to the ascertaining of average weights, that being the act of 1905. It may be conceded that by the literalism of the act of 1907 the Congress fixed the rates thereafter to be paid on certain routes, and thus for the first time made a rate that was other than a maximum rate. But in doing that no change was made in the right, power, or duty of the Postmaster General to ascertain the average weights under the permissive features of the law.

As bearing upon the effect of the act of 1907 and upon the method of ascertaining the average weights then in vogue, it is earnestly urged that certain proceedings in Congress, as well as the act of 1907 itself, evidence a purpose on the part of Congress to make permanent

the divisor then being used, and that such effect must be given to said act and proceedings.

It is plain that the act does not in terms say what the divisor shall be. The House committee's bill, as reported, provided a method for ascertaining the daily average weight "by the actual weighing of the mails for such number of successive days, not less than one hundred and five." Accompanying the bill was a report explaining the prevailing construction and practice and that the purpose of the said provision was to change the method of ascertaining the daily average weight. This provision in the bill was confessedly subject to a point of order under the rules of the House, and it was accordingly so ruled later. The two amendments offered by a Member were ruled out of order by the Chairman and his ruling was sustained upon appeal. These proceedings were being had in Committee of the Whole House on the state of the Union. The vote that was taken was upon the correctness of the Chairman's ruling, and not upon the merits of the proposed amendments. Placing his ruling upon one of the grounds stated by him that an amendment which will have the effect of changing the discretion vested in an executive officer by law is a change in existing law, the ruling would seem to be correct if we may have recourse to the precedents wherein it is held that an amendment to an appropriation bill having that effect is subject to a point of order. (Hind's Precedents, vol. 4, pp. 569, 570, secs. 3848 et seq.) It may be questioned whether proceedings thus had in Committee of the Whole House on the state of the Union amount to legislation. They can not be accepted as showing the meaning of an act that was adopted containing no reference to the method of ascertaining the average weight. These proceedings were had two years after the act of 1905, where some reference is made to average weights. That the amendments proposed, and for that matter the committee's amendment, would have made definite and mandatory a method of finding the average weight and would have removed any permissive or directory feature in the law or any discretion of the Postmaster General in its application is plain.

65 Assuming that the statutes under which he acted had authorized the Postmaster General in his discretion to adopt one or another method, the use of the divisor 30 was not mandatory upon his successors, and since Congress has not changed the law, that power continues. We can not say that the refusal of the House, if it were so, to make permanent law on the subject was in fact or effect a making of the divisor fixed and absolute. They can not be said to have included an element which they excluded. Since they refused to adopt the proposed amendments which would have removed the discretion and would have made a fixed divisor of 105, we can not say that they removed all discretion and made a divisor of 90 when the legislation omits any reference to either. Nor is the situation altered by reference to other proceedings in the House and Senate.

The courts have consulted legislative proceedings to learn the history of the period, and it is said in the Tap Line cases, 234 U. S., 1, 27, that the debates may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

In St. Louis & Iron Mountain Railway Co. v. Craft, 237 U. S., 648, Mr. Justice Van Devanter delivering the opinion, interpreted the law in question according to its terms and then made "a brief reference to the peculiar circumstances in which the new section was adopted," to show that they gave material support to the conclusion to which the court came after considering the terms of the act. After stating the reports of the Judiciary Committees of the two Houses, he adds (p. 661) that while these reports can not be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted. The act was not silent upon the question involved, and its terms were construed, and this not by what the proceedings showed but by what was "fairly within its words."

Similarly, in Delaware & Hudson Company case, 213 U. S., 366, reference is made to certain legislative proceedings, but the court declined to extend the meaning of the statute beyond its legal sense because of a supposed intention not manifested in its terms, and it was said by the Chief Justice that if the mind of Congress was fixed upon a stated proposition, "then we think its failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." This court, in Atchison, Topeka & Santa Fe R. R. case, 52 C. Cls., 388, referred to proceedings in Congress for the purpose of ascertaining the subject matter of legislation, to which the mind of Congress was addressed, and to which they gave expression. We can not think that the refusal of one or both Houses to legislate upon a given subject amounts to making mandatory a law which was permissive, or to the withdrawal of a discretion with which an executive officer was charged.

The other cases cited on the briefs are not in conflict with our view.

We hold, therefore, that the Postmaster General had the same authority in 1907 that he had in 1873 and 1875, and thereafter, whether the law contemplated an actual average or a permissive one. Other contentions of plaintiffs are concluded by what has been said.

The case of the land-grant roads depends upon the validity of Order No. 412, and we can not say it was an unlawful exercise of the Postmaster General's discretion under the law. It may be added that the action is by a plaintiff on parts of whose lines are land-
66 aided sections and that the plaintiff contracted for all classes of its routes.

As to all plaintiffs, being free to contract, the considerations to be stated are controlling. Whether the daily average weight should be ascertained according to the literal terms of the act of 1873 or according to the discretion of the Postmaster General, having regard to the questions left for him to solve, the result is the same because in either case their rights were fixed by their contracts to transport the mail.

Second and chiefly: The actions are upon contract. Under the views expressed herein, and in the Chicago & Alton and the Yazoo & Mississippi Railroad Company cases, no further discussion of the contention that the statute fixed the compensation is necessary. There was no statutory contract.

It is contended, however, that there was no express contract, and that recovery should be had upon a supposed implied contract, the damages or compensation to be ascertained as upon quantum meruit. While this contention would seem to be a departure from what we think is a proper conclusion from the averments of the petitions, that consideration may be pretermitted.

The general rule is that where one party, at the request of another, does work and labor or performs service for the benefit of such other, the law will imply a promise on the part of the one receiving the benefit to pay the reasonable value of the work and labor done or the service performed where there is no express contract between them fixing the terms upon which the service is to be performed.

"Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation * * *. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." Curtis v. Fiedler, 2 Black., 461, 478; United States v. Russell, 13 Wall., 623, 630.

By an express promise a party may agree to pay more than the work and labor done or the service performed is reasonably worth, or he may agree upon a measure for ascertaining the value of the work and labor done or service performed.

It was stated in the Yazoo & Mississippi case that the record did not show a basis upon which the court could properly adjudge what was the reasonable value of the service performed, and plaintiffs urge that the compensation paid for similar service under prior express contracts should be taken as proof of what the service rendered under the implied contract was reasonably worth—that the former course of dealing, in the absence of more definite proof, is sufficient to establish the essential fact. The contention overlooks, however, an important element in the prior express contracts. That element was the authorized exercise by the Postmaster General of discretion in proposing or agreeing to the compensation, and the court can not supplant his discretion by any of its own, because it has no discretion. What he did in the exercise of his discretion and the performance of his duties when considering his course with reference to a given average weight and the terms of a contem-

67 plated contract can not be accepted as proof that a service performed after he had exercised his discretion in another way is to be paid for on the basis which he has rejected. The rule could be applied, as has been done, where both parties understood that the service was being performed without any stipulation by both or offer by either of the terms. To apply it in these cases leads to the result that by refusing to accept the Postmaster General's proposal the carriers can carry the mail, receive regular installments of pay therefor, according to the terms of an offer, and by withholding express assent to a vital term in the offer can impose a contract upon the Government which its agent refused to make. It is well

established that a contract can not be imposed upon the carrier. It was not until the act of 1916 that carriers were not free to accept or reject the proposals of the Postmaster General and to refuse to transport the mail.

The carrier's rights being well defined, its duties to accept the proposed terms or to refuse to transport the mail is apparent. By its refusal the Postmaster General would have been obliged, in the performance of his statutory duty, to have made other arrangements or to have offered more satisfactory terms. The law will not raise up a promise which involves the breach or defeat of a statutory duty.

When proceeding in a proper case to ascertain reasonable compensation as upon quantum meruit, the pay is commensurate with the service rendered—"that payment should be made for what was done." Jacksonville, P. & M. R. R. Co., 21 C. Cls., 155, 170; Railroad v. United States, 101 U. S., 543, 549. A right to recover as upon quantum meruit implies that the party should have such payment as he reserves for the services performed.

To be entirely accurate in such a matter the carrier would have to be paid for the weights carried. These can not be known, and the only basis for them is the ascertained average.

As to the seven-day routes, there can be no question that upon the fullest application of the rule they can not recover as upon quantum meruit in face of the acknowledged fact that they have received payment for the average weight of mails actually carried. Their claims are illustrated near the beginning of this opinion.

If it be conceded that because of a lawfully vested discretion the Postmaster General was authorized to contract with railroad companies upon the basis as to 7-day routes of a permissive or factitious daily average weight, and at the maximum rates prescribed by law, and further that Congress by their repeated appropriation recognized or approved his action in that regard, as they had the right and power to do, it must yet follow that a court is without right to increase either the daily average weight or the rates prescribed by statute, whether they be maximum or fixed rates.

On the other hand, if their case rested alone upon that question, it might be said that the average on the 6-day routes could not be decreased. Certainly quantum meruit does not mean that they shall be paid for more average weight than they carried, for more service than was performed, and if the 6-day routes are not strictly in that situation, it yet follows that the view next stated is determinative and is applicable alike to both classes of routes.

The mails were transported under express and not under implied contracts.

68 Upon the receipt of the distance circular the carrier signed the acceptance, in some instances without qualification, in others with an exception noted therein by its officer, protesting an unwillingness to be bound or refusing to be bound by Order 412. It may be conceded that as to those so objecting there was up to that time no meeting of the minds, and consequently no contract between the parties. Standing alone, "plainly no contract between the parties

resulted from the correspondence so far had between them." It is equally true that if the acceptance clause had been signed without exception a carrier could not have sued the Government as for a breach of contract if the mails had not been subsequently offered, because it was yet open to the Postmaster General to adjust the compensation and propose his terms. He was still charged by the statute with the duty of contracting within the maximum rates or for such compensation as he regarded as just and reasonable. But more occurred. The Postmaster General informed the protesting carriers that they could only carry the mails in accordance with the rules, regulations, and laws, and thereafter when he sent to the several plaintiffs the result of his computation, it stated the terms of his proposal. It was not a four-year contract, but was a readjustment of compensation, "unless otherwise ordered," which had the effect of limiting the duration of the contract. Eastern R. R. case, 129 U. S., 391; Delaware & Lackawanna R. R., 51 C. Cls., 426. It also stated that the carrier was subject to fines and deductions and to the rules and regulations of the department, and Order 412 was one of these.

A carrier which had qualified its acceptance of the distance circular was not bound to accept the proffered terms. A contract could not be imposed upon the carrier (cases supra), nor could it compel the letting to itself of a contract for mail transportation. As is stated in one of the briefs, "it was for the Postmaster General, acting upon his own appreciation of the extent of his lawful power to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit." And while this statement was apparently intended to apply to the situation of the parties as they stood when plaintiff had qualified the terms of the acceptance clause, it none the less correctly states the attitude of the parties thereafter until plaintiff had received and transported the mails and had received periodical payments therefor in accordance with the readjustment notice. The carriers accepted these payments without objection of any kind.

In the Eastern Railroad Company case, supra, it was said by this court:

"When the extent of an implied contract or the meaning of the language of a written contract are in controversy, the intention of the parties becomes all important. Their acts at the beginning and during the term of the contract acquiesced in on both sides, the claims and construction set up by one party and not denied by the other, go very far to explain, if they do not actually establish by way of estoppel, the actual contract between them as well as its proper interpretation. (Otis v. United States, 19 C. Cls., 467.) The present claimant having no clear and definite time contract was bound to take notice of the Postmaster General's offer of future compensation, and its acts at the time amount to an acceptance of his offer."

69 This case was affirmed in 129 U. S., 391; and it is there said (p. 396):

"Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878,

and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

In the Martin case, supra, the Supreme Court stated two principles, both of which are applicable in these cases: The one that the act was merely directory and did not interfere with the freedom of contract, and the other that as the parties were free to contract, effect was to be given to the action and conduct of the plaintiff in having repeatedly accepted, without protest or objection, payments based upon the contract as the Government understood it to be. Other courts have applied the same principles.

In Coleman's case, 81 Fed., 824, it is held that even if the construction of the statute therein mentioned is too broad, and the petitioner be entitled to its benefits, he would yet have no right of action in the absence of notice by protest or objection that the payments were not in discharge of the liability.

In Timmonds' case, 84 Fed., 933, the Circuit Court of Appeals, Seventh Circuit, took the same view, and, referring to Martin's case (p. 934), said:

"It was there ruled that the provision in question is in the nature of a direction by the Government to its agents, and is not a contract between the Government and its servants; that it does not specify what sums shall be paid for the labor of eight hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less;" that being in the nature of a direction, the statute does not constitute a contract to pay for the excess time and that the employee "was under no compulsion, he could have abandoned his service if it proved distasteful or onerous," just as plaintiffs here could have done if there was no express contract.

In Moses's case, 126 Fed., 58, the Circuit Court of Appeals, Ninth Circuit, took the same view of the contractual relations between the parties.

In Averill's case, 14 C. Cls., 200, 206, it is held that where the employee continued to work, was paid by the day and accepted the payments, he could not maintain his action based upon the theory that eight hours constituted a day's work. Gordon's case, 31 C. Cls., 254.

In McCarthy v. Mayor, 96 N. Y., 1, the court took the view that the act before them was intended to place the control of the hours of labor within the discretion of the employee rather than of the employer, and yet held that unless there was an express contract providing for extra compensation, it could not be implied.

In Grisell v. Noel Brothers, 36 N. E., 452, the Indiana Appellate Court said that the statute permitted parties to contract, and that if one person employs another to perform work for a stated sum, and at the end of the time pays that sum, and the employee accepts it in payment, he can not afterward recover an additional sum albeit he may have worked for longer hours.

70 "The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies where the work is done by the week or month or year."

It appears in that case, as it does in these, that the plaintiff knew when he entered upon the service the nature and amount of work that was required of him, as well as the compensation he was to receive therefor, and it was said that if he was not satisfied at the end of a day or week with what was being paid him, he should have exacted an agreement for more compensation or exercised his right to quit the employment.

"By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation."

The principle is illustrated by Vogt v. City of Milwaukee, 74 N. W., 789, where an employee worked 8 hours daily for the first 30 days, and thereafter, without protest, worked 12 hours a day and received the same pay. A city ordinance had provided that 8 hours should constitute a full day's work for city employees. The plaintiffs sued for compensation for overtime and contended that the ordinance entered into and became a part of the contract, and that thereby the city became bound to pay the amount specified for each day of 8 hours' service. A similar contention is made in these cases. The Supreme Court of Wisconsin held otherwise, and said (p. 791):

"The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value in cases of implied contract after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff can not now be permitted to dodge or escape the legal effect of his conduct."

It it unnecessary to multiply cases (though some are cited below) to establish the rule that the existence of contractual relations or the acceptance of a proposal can as well be shown by the action and conduct of parties as by their language. What a party does can as well conclude him as what he says he will do. Each time a plaintiff was paid, and received the compensation stated, it "as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified." Vogt v. Milwaukee, supra, citing Miller case, 14 C. Cls., 200.

It was held in Baird's case, 96 U. S., 430, where the plaintiff had presented an unliquidated claim to an accounting officer, claiming over $150,000, which they reduced to about $97,000, and then sent him a voucher for the latter amount, which he received without protest or objection, that he was concluded by his action in accepting the payment.

The rule was applied in Garlinger's case, 169 U. S., 316, 322, and was recognized in McMath's case, 51 C. Cls., 356.

Cases supra; Central Pacific Co., 164 U. S., 93, 97; Illinois Central R. R. Co., 18 C. Cls., 118, 132, 136; Jacksonville, Pensacola & Mobile Co., 21 C. Cls., 155, 170, 171; 118 U. S., 626; Minn. & St. Louis

Ry. Co., 24 C. Cls., 350, 360; Alabama Great Southern R. R.
71 Co., 25 C. Cls., 30, ibid. 142 U. S., 615; Texas & Pacific Ry. Co., 28 C. Cls., 379, 390; other cases; Chicago & Alton Case, p. 521, 532.

If any effect is ever to be given to a party's action as determining the existence of a contract, these cases call for its application.

It is admitted that the carriers received and transported the mail after the alleged exception to Order 412; admitted that they received compensation in accordance with the readjustment notice; admitted that this compensation was paid monthly or periodically; admitted that the readjustment of compensation was made for no definite period, but "unless otherwise ordered"; admitted that the readjustment of compensation was subject to fines and deductions; admitted in at least one of the cases at bar, and it may be assumed as to others, that fines and deductions were imposed and retained without objection; admitted or shown that the notice stated that the compensation was based upon not less than six round trips per week; admitted or shown that no objection to the payments was at any time made, and that several years intervened before suit, and these things being true, the action and conduct of the plaintiffs were plainly inconsistent with their present contention.

The distance circular proposed no terms and the readjustment notice did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself. While the carrier had protested it would not consent, it yet consented. A party will not be heard to deny the natural and reasonable effect of his action as regards his contractual relation or to take a position inconsistent therewith when to do so would involve a breach of official duty by the other contracting agent. The law required the Postmaster General to make contracts for mail transportation, to file copies of them (Rev. Stats., sec. 404), and to enforce fines and deductions under the terms of his contracts with railroad companies (act of June, 1906). It did not lie with the carrier to defeat these requirements by a refusal to accede to one term of the proposal and then pursue a course of action antagonistic to the suggested refusal. It can not compel the leaving of the contractual relation to be implied. It could have refused the terms or it could have accepted. It could not select those that served its purposes and leave to the incertitude of the future the ascertainment of the terms upon which the mail was being transported. In a matter of so great public importance, it was its duty to be definite and to speak if it did not intend to be bound. Their action establishes the essential fact. The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General, and, having been paid the sums respectively due them, it follows that their petitions should be dismissed. And it is so ordered.

BOOTH, *Judge*, concurring:

I concur in the opinion of the court and might well rest the matter with this statement. Having, however, positive conviction as to the case itself it may not be amiss to briefly discuss some features of the litigation which lead to the foregoing opinion.

The relationship between the carriers and the United States was contractual. The Postmaster General was free under the
72 statute to negotiate and consummate such contracts for the carriage of the mails as he deemed just to both the contractor and the Government, subject only to the express limitations enumerated in the act of 1873. The limitations in the act of 1873, in so far as the present case is concerned, circumscribed alone the maximum compensation to be paid the contractor and prescribed a minimum period of weighing to ascertain the "average weight per mile per annum" upon which the compensation was to accrue. There is nothing aside from these provisions in the statute which irrevocably bound the Postmaster General to contract with the carriers on the basis of the mathematical process adopted by him after the statutory weighing period had been observed; he might pay the maximum compensation; he might pay less; and surely was invested with the official discretion indispensable to the making of an agreement fair to both parties. Within the zone prescribed by the terms of the act of 1873 there was an unfettered field wherein the right of contract was unabridged. The claimant company and the Government within these limits stood upon an equality and the bargain consummated was subject in every way to the ordinary rules governing ordinary contracts. The claimant company accepted the mails and performed its part of the contract in the face of an express provision, directly made a part of the contract, in response to claimant's protest, and finally accepted the compensation fixed in the contract without further protest or objection. Yazoo & Miss. Valley R. R. v. United States, 50 C. Cls., 15.

A careful review of all the legislation pertaining to the administration of the Post Office Department, and particularly with respect to the transportation of the mails, discloses a legislative intent to refrain from denying a wide discretion to the Postmaster General in the matter of administrative detail. If Congress designed a fixed and determinate compensation to be paid upon the average mileage basis per annum there would have been no necessity to do more than provide the means of ascertaining the same and thereby limit the contracting authority of the Postmaster General. The various statutes upon this subject, as most pertinently observed by the Solicitor General, were clearly intended to fix a maximum compensation, fair in any event to the railroad company and of sufficient elasticity to protect the Government. The field of fair negotiation, except as expressly provided, was left open, and the railroad company was under no compulsion to accept the terms of a contract it believed to be onerous and unremunerative. (See cases cited in opinion of Chief Justice.) Having engaged to perform a service under the terms of a

contract authorized by law and having performed said service and accepted the full compensation agreed upon by the parties, it is difficult to perceive upon what authority a suit for increased compensation can be predicated in view of the authorities cited in the Chicago & Alton case, 49 C. Cls., 520, 521.

The act of 1873 expressly precludes the possibility of preciseness in ascertaining compensation to be paid the railroad companies for the transportation of Government mails. "The pay per mile per annum shall not exceed * * *. On routes carrying their whole length an average weight of mails per day * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty * * *" This language formulates a method inherently
73 discretionary. The very terms used erect a flexible basis to meet changing conditions and varied circumstances. Thirty days was considered by Congress as the minimum of fairness in the ascertainment of an annual average. Can it be said that a long-continued departmental opinion that the period stated continues to bring to the railways a fair compensation ripens into an unchangeable law, absolutely concluding the department from meeting changed conditions and circumstances? Judge Barney has discussed this phase of the case, and with his discussion I unreservedly agree. I think the statute abounds with express and unambiguous terms which unmistakably repose a wide discretion in the Postmaster General a clear legislative intendment to do no more than prescribe such limitations as Congress deemed wise, leaving the Postmaster General free to act in all other respects.

BARNEY, *Judge*, concurring:

It has been said that wise men often change their opinions, and I wish to exemplify the fact that unwise men sometimes do the same thing. My views of the act of 1873 will be found expressed in the case of N. Y., N. H. & H. R. R. Co., decided February 25, 1918, 53 C. Cls., —.

I do not think it can be judicially said that by the terms of section 4002 R. S. any divisor was absolutely provided for. The Postmaster General was thereby directed to pay the railroads in proportion to the average weight of the mails carried, this average to be determined by weighing the same at least once every 4 years for not less than 90 working days. Of course this would imply some mathematical process which would involve some kind of a divisor. In any event the compensation paid should not exceed a definite sum named. This weighing, whether by the railroads as at first provided or under the supervision of the Postmaster General himself, was for his benefit alone and for the purpose of enabling him to exercise wise discretion in making contracts for the carriage of the mails. The details to be followed in the weighing in order to approximately obtain the average was entirely at the discretion and under the direction of the Postmaster General. It was for his information it was to be obtained, and it was for him alone to say how this was to be done. I can see

why this long continued exercise of this discretion in a certain way should not be changed as to existing contracts because contracts are construed according to the intention of the parties to them when they were executed, and in this case these existing contracts were understood by both parties to have been executed in the light of the then existing method of obtaining average weights. But I do not see how a discretionary authority can ever be said to ripen into law by continued usage. Presumably the Postmaster General for a succession of years obtained such average weight in a way he thought best adapted to do justice to the different classes of railroads carrying the mails. This discretion seemed to be implied in the law.

Circumstances mentioned and described in the opinion of the Chief Justice became materially changed, and what was perhaps at one time a proper exercise of this discretion became improper, and a later Postmaster General in the exercise of the same power of discretion obtained this average weight in another way. In both instances it was a proper exercise of discretion which was once changed in
74 effect, and can be changed again if reasonably within the statute so as to affect the future contracts for the carriage of the mails.

DOWNEY, *Judge*, concurring:

I concur fully in all that has been said by the Chief Justice in the opinion of the court. Perhaps a word more might be added with reference to the theory presented in those cases in which the railroad companies injected into their proposals to carry the mails "upon the conditions prescribed by law and the regulations of the department" an exception with reference to Order 412, that the subsequent delivery of mails to such railroad for transportation by the United States gave rise to a contract in which Order 412 was not embodied. The contention might have force if the transaction rested there. But it did not. The Postmaster General specifically declined to permit any exception as to Order 412 and insisted that the contract should be subject to all the regulations of the department, as in its terms it was, and if effect is to be given to subsequent action of either of the parties, as it undoubtedly must be, it is to be found in the voluntary acceptance by the railroad companies of the mails for transportation under these circumstances, after the specific refusal of the Postmaster General to modify terms, and which action can not be interpreted otherwise than as an acceptance of a contract which was subject to and in which were embodied all the regulations of the department applicable thereto. The service was performed under such a contract, compensation was paid and accepted thereunder, and it seems idle now, because of an antecedent protest or an attempted but rejected modification of terms, to contend that the contract is something else than as entered into or is in some respect not binding upon one party thereto. It is difficult to see any basis upon which, after having entered into a contract not tainted with fraud or duress, performed service thereunder and received compensation therefore in accordance with its terms, the court can now

be asked to write and enforce a different contract. The equities of rule 412 are capable of demonstration, the inherent and unexhausted discretion of the Postmaster General is as evident as it was necessary, but in my judgment, while other and related matters are proper subjects of discussion, we have to do, in the last analysis, with a contract relation and must leave the parties where, by their contract, they have placed themselves.

HAY, *Judge*, concurring:

It would seem, and indeed is, a work of supererogation to add anything to the very able and exhaustive opinion of the Chief Justice in this case. In his opinion he has discussed clearly and with singular ability every phase of it. Although I am convinced of the soundness of the views therein expressed, I have deemed it not unwise to very briefly express my views on one branch of the case.

The plaintiffs, in these cases, seem to insist that while the Postmaster General was given discretion, under the law, to determine the manner in which their compensation for carrying the mails may be determined, yet that he, having once exercised that discretion, could not change the method so adopted. The above is a bald statement of their contention. The mere statement of it is its refutation.

75 It would be monstrous to say that an executive officer, clothed with discretion to do certain things, in exercising the discretion given him, is bound to continue to act in the method first adopted by him, no matter whether that method was equitable or inequitable, proper or improper, just or unjust to the parties affected.

The fact that it was a long-continued usage does not change the principle. If in the course of time, it is discovered that the usage adopted is unjust to one of the parties, surely it will not be denied that the executive officer, exercising the discretion conferred upon him by law, can change the method; certainly this must be so when the change is not made to affect any person with whom a contract is being carried out, but applies only to contracts to be made in the future.

The opinion of the Chief Justice fully discusses and covers all the points of the case and I heartily concur in his conclusions.

76 VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eleventh day of March, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the New York Central and Hudson River Railroad Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition be and it hereby is dismissed.

BY THE COURT.

VIII. *Claimant's Application for, and Allowance of, an Appeal to the Supreme Court.*

Now comes The New York Central and Hudson River Railroad Company, claimant in the above entitled action and prays the allowance of an appeal to the Supreme Court of the United States from the judgment of this court rendered in said cause on the 11th day of March, A. D. 1918.

McKENNEY & FLANNERY,
*Attorneys for Claimant.*

Filed June 5, 1918.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

June 10, 1918.

77 Court of Claims.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

vs.

THE UNITED STATES.

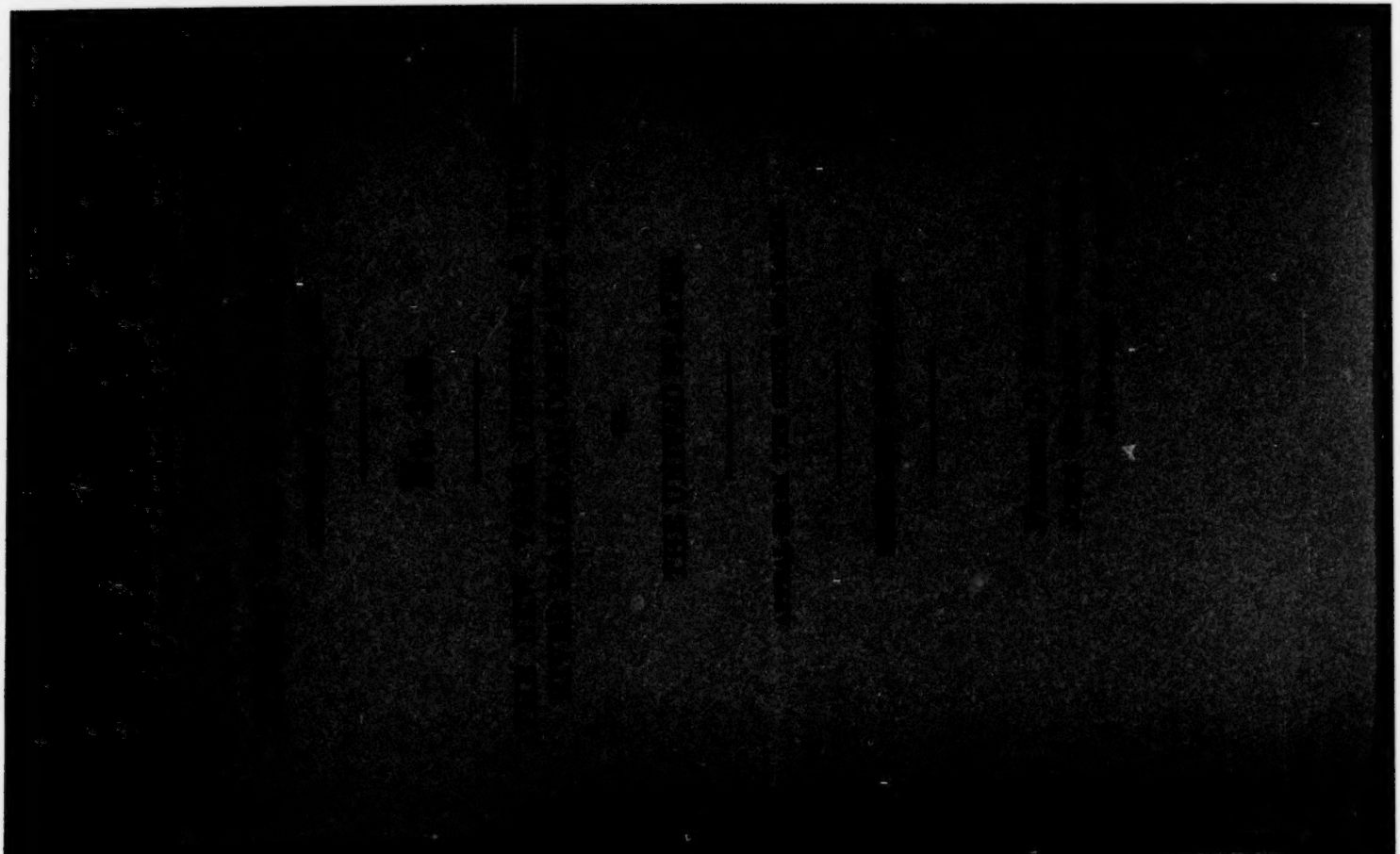
I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the opinion of the court by Campbell, Ch. J., and of the concurring opinions by Booth, J., Barney, J., Downey, J., and Hay, J.; of the judgment of the court; of the claimant's application for, and allowance of, an appeal to the Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of June, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
*Chief Clerk Court of Claims.*

Endorsed on cover: File No. 26586. Court of Claims. Term No. 500. The New York Central & Hudson River Railroad Company, appellant, vs. The United States. Filed June 12th, 1918. File No. 26586.



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## Table of Cases.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

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# No. 133.

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THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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## BRIEF FOR APPELLANT.

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### SHORT STATEMENT OF CASE and OUTLINE OF POINTS RELIED UPON FOR REVERSAL.

Appellant, The New York Central and Hudson River Railroad Company, sues to recover the sum of $1,257,630.36, being a balance claimed to be due it under applicable laws of the United States for

transporting United States mails over certain specified railway postal routes, between July 1, 1909, and June 30, 1913, both inclusive.

The Court of Claims upon the facts found by it (R., 15-34) held that appellant was not entitled to recover and directed the petition herein to be dismissed (R., 34).

The case is typical of the class of cases commonly referred to as Mail Pay Divisor Order Cases, and apart from mere inconsequential details, such as dates and the amounts claimed, differs from the case of *The Northern Pacific Railway Company vs. The United States* (No. 109, O. T., 1919), heard herewith, chiefly if not solely in the fact that the Northern Pacific Railway Company is a railway company "to which the United States have furnished aid by grants of lands, right of way, or otherwise," and consequently is subject to the act of June 8, 1872 (17 Stats., 309), and subsequent acts specifically pertaining to the carriage of mails over so-called "Land Grant Roads," while such acts have no pertinency in the instant case.

Appellant contends that in the absence of an express contract between it and the United States, acting through and by the Postmaster General providing otherwise, it should have been paid and is

now entitled to recover from the United States, for mail transportation service which it faithfully rendered during the period in question, compensation at annual rates per mile of road operated, varying only with the varying average daily weights of mails carried per annum the entire length of each route, such average daily weights to be ascertained in the case of each route precisely as required by the mandatory provisions of the acts of March 3, 1873 (17 Stats., 558), as modified by the acts of July 12, 1876 (19 Stats., 79), June 17, 1878 (20 Stats., 142) and March 3, 1905 (33 Stats., 1082, 1088).

While not specifically required by statutory provisions to "carry the mails at such prices as Congress may by law provide," as are the so-called "Land Grant Roads," nevertheless, having for many years carried the mails under the law and at the rates prescribed by Congress between the greatest mercantile and most densely populated centers of the United States, out of deference to the compulsory character of the public service which it, in conjunction with other mail-carrying railroad companies, had served to create, and the ever-present and goading demands and necessities of commercial and social intercourse, which it alone in great part was capable of even reasonably satisfying, this appellant, during the period in question, was without practical choice and was as truly bound by

its duty and obligation to the communities which it served to carry without cessation, notwithstanding differences between the Postmaster General and itself, as were the "Land Grant Roads," leaving questions respecting amounts of compensation payable to them under the law for the service rendered to be determined in orderly course by appropriate courts of law.

In this view no estoppel in law or equity reasonably ought to be predicated upon the acceptance, from time to time, of such sums by way of compensation as the Postmaster General, against appellant's clearly expressed and never withdrawn protest, erroneously and improperly tendered to it, particularly as both the Postmaster General and the Congress of the United States were fully informed long prior to July 1, 1909, the beginning of the period of service now in question, of the protest on part of the mail-carrying railroads of the United States to the use by the Department of the rule prescribed by the so-called Divisor Order No. 412 for ascertaining the daily average weight of mails carried the whole length of their respective roads, of the fact that this appellant declined to contract to carry if the applicability of Order 412 was to be insisted on, and of the further fact that certain of the railroad companies who had protested had also filed suits calling into question the

validity of such order. (See Finding of Fact XV, R., 34.)

Appellant also contends that in the absence of an express contract voluntarily entered into between the Postmaster General and itself, the service which it rendered between July 1, 1909, and June 30, 1913, both included, in transporting the mails under the circumstances conditions and between points specified in the Findings of Fact, gave rise to an implied contract on the part of the United States to pay for such service at the rates specified by the statutes which both authorized the service and prescribed rates of compensation to be paid therefor.

Also that the Postmaster General was without lawful authority to promulgate Divisor Order 412, as same contravenes the express mandatory terms of the statutes of the United States which prescribed both the duty and the power of the Postmaster General in the premises. Being without lawful power to prescribe any such rule as Divisor Order 412 furnishes for ascertaining the average weight of mails per day carried throughout the whole length of the respective routes here involved, Divisor Order 412 neither constitutes a condition of the railway mail service "prescribed by law" nor a regulation "of the Department applicable to railroad mail service."

Both the Post-Office Department and appellant having declined to enter into an express contract for this service, which the former desired and the latter alone was able satisfactorily to perform,—the single point of difference between them being the proposal by the former to inoculate the tendered form of contract with the virus of Divisor Order 412, and the refusal by appellant to accede to such unlawful operation, the Department, though precisely informed (Finding XII, R., 29) that—

> "This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order (No. 412), and reserves the right to insist on payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General, March 2, 1907;"

nevertheless, and without more, beginning July 1, 1909, and continuing through the period in question, tendered to appellant at long-established receiving points and in the long-accustomed and usual manner mails to be transported to designated destinations over the respective routes involved, and appellant, safeguarded in its rights by the above, safely transported and delivered the same.

The service thus requested and rendered in the absence of an express agreement as to compensation to be paid therefor, entitled appellant to receive and obligated the United States to pay its reasonable worth, of which the statutes of the United States furnish the measure.

The elements of length of route and the daily average weight of mails per annum carried being known, the statutes of March 3, 1873; July 12, 1876; June 17, 1878, above referred to, together with applicable valid regulations of the Post Office Department, supply the only other elements necessary to be considered, and a simple arithmetical calculation furnishes the answer to the problem. Under the circumstances appellant is not now to be estopped by its acceptance of the lesser sums tendered by the Department on the basis of its wrongful ascertainment of average daily weights carried from maintaining suit to enforce its demand for the balances claimed to be due, the Postmaster General, from the beginning to the end of the period during which the service was rendered, having been fully informed as to the contentions of appellant based upon above statutes and as to the amount of compensation rightfully payable to it.

Acceptance of a smaller amount, even though expressed to be in full satisfaction of a larger amount claimed (which was not the case here),

where the amount claimed is a liquidated sum, or, where, as here, is readily to be liquidated by a simple arithmetical computation, will not constitute payment in full nor operate as a bar to either a claim or suit brought for the balance. *Fire Ins. Assn. vs. Wickham,* 141 U. S., 564, 577; *Chicago, Mil. & St. P. Ry. Co. vs. Clark,* 178 U. S., 353, 366, 372.)

**ASSIGNMENTS OF ERROR.**

**I.**

Upon the facts found by the Court of Claims its judgment should have been for appellant in the sum of $1,257,603.36.

**II.**

Error in concluding as matter of law that the promulgation of Divisor Order 412 and its application to the instant case was within the lawful discretionary powers conferred upon the Postmaster General by the act of March 3, 1873 (17 Stats., 558).

**III.**

Error in concluding as matter of law that the method prescribed by Divisor Order 412 for ascertaining the average weight of mails per day carried the whole length of each route concerned, was

a lawful method for such purpose, notwithstanding the express provision of the act of March 3, 1873 (17 Stats., 558), that "the average weight (of mails per day carried the whole length of the particular route) to be (shall be) ascertained in every case by the actual weighing of the mails for such a number *of successive working days,* not less than thirty (by act of March 3, 1905, 33 Stats., 1088, "not less than ninety") * * * as the Postmaster General may direct.

## ARGUMENT.

### General Considerations and Historical Summary of Applicable Statutes and Cotemporaneous Practice of Post Office Department Thereunder.

These cases are similar to the cases of Chicago & Alton R. R. Co., appellant, *vs.* United States and Yazoo & Mississippi Valley R. R. Co., appellant, *vs.* United States, numbered respectively 30 and 58 of October Term, 1916, wherein the judgments of the Court of Claims dismissing the petitions (see 49 Court of Claims Reports, 463, and 50 *ibid.*, 15) were, on January 15, 1917, by this Court, affirmed by an equally divided court (242 U. S., 533).

The issues involved in this case are not foreclosed by any prior decision of this or any other

tribunal of controlling influence. The doctrine of *stare decisis* has no application here.

The learned opinions and judgments of the Court of Claims above referred to, which set aside that court's own previous opinions and judgments in favor of the carriers named, did not crystallize into controlling authority, though affirmed here by an equally divided court.

As said in Hertz, Collector, &c., *vs.* Woodman, 218 U. S., 205, 213, Lurton, A. J., speaking for the court:

> "Under the precedents of this Court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the Court sitting, prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts."

Apart from the rule thus authoritatively declared, the cases referred to cannot incite to action the rule of *stare decisis*, because of substantial differences with the case at bar. In the cited cases the actions were based upon what were asserted to be completed contracts in writing. The instant case proceeds upon an implied or constructive contract founded upon a statutory duty and obligation

to pay the reasonable worth of the service performed by plaintiff at defendant's request. Viewed from the standpoint of things adjudged, the issues here involved are *res integra.*

Appellant conceives that the correspondence between Second Assistant Postmaster General and itself, set forth in the findings of facts in this case, demonstrates that there was no express contract in writing between the United States or the Postmaster General or Second Assistant Postmaster General and itself covering or limiting compensation to be paid to it for transporting the mails during the period of July 1, 1909, to July 1, 1913, or any portion thereof, particularly such a contract as is sometimes styled "a correspondence contract."

For many years prior to July 1, 1909, appellant had been continuously engaged in the transportation of mails over the numerous mail routes specified in the findings of fact pertaining to this case, and had been receiving during all of such years, at understood intervals, from the United States compensation for such service, which compensation had, throughout the entire period of carriage, been ascertained and determined by the Post-Office officials and itself in hearty accord upon bases which both conceived, and as evidenced by the long-continued course of action had in effect agreed, were

established by law declared and exposed in the provisions of the acts of June 8, 1872, ch. 335, 17 Stats., 309, R. S. U. S., 3997; March 3, 1873, 17 Stats., 558, R. S. U. S., 4002; March 3, 1875, 18 Stats., 341, July 12, 1876, 19 Stats., 79; July 17, 1878, 20 Stats., 142; March 3, 1905, 33 Stats., 1082, 1088, and the act of March 2, 1907, 34 Stats., 1205, 1212.

By the act of June 8, 1872, 17 Stats., 308, sec. 201, all railroads or parts of railroads then or thereafter operated were declared to be "post roads" (R. S. U. S., 3964), and by act of March 1, 1884, ch. 9, 23 Stats., 3, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes."

The establishment by law of all railroads as "post roads" meant nothing more than that the mails could and might be transported over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake without the consent of the railroad companies, and without making compensation therefor, to require any railroad company to transport the mails over its lines.

Atlantic, etc., Tel. Co. *vs.* Chicago, etc., R. Co., 6 Bissel, 158; 2 Federal Cases No. 632.

"Post roads" and "post routes" are not synonymous terms. The term "post route" indicates the appointed course or prescribed line of mail transportation, while "post roads" indicates the highways or public passages, as, for instance, railroads, employed in connection with or for the purposes of such transportation.

Blackham *vs.* Gresham, 16 Federal Reporter, 611.

U. S. *vs.* Kochersperger, 26 Federal Cases No. 15,541.

The right of the United States in the property established as a "post road" is the mere right, on making adequate compensation, of transit over such "post road" for purposes incidental and necessary to the carrying of the mails, and in the case of obstructing this right to provide by its own laws an adequate remedy or suitable punishment.

Cleveland, etc., Co. *vs.* Franklin Canal Co., 36 Federal Cases No. 2890.

The act of June 8, 1872, *supra* (sec. 215: R. S., 3965), required the Postmaster General to "provide for carrying the mail on all post roads established by law," and also (sec. 210: R. S. 3997) required the Postmaster General to arrange "the railway routes on which the mail is carried" into three classes, according to the "size" of the mails,

the speed at which they are carried and the frequency and importance of the service and restricted (R. S. U. S., 3998) the amount of compensation which should be paid "per mile per annum" to the carriers operating such routes in respect to each of the classes of "railway routes" provided for. This was in effect but a reenactment of the act of March 3, 1845 (5 Stat., 738), discussed below.

In order to ascertain as approximately as might be "the size of the mails" carried over any particular "post route," the Post-Office Department, subsequent to 1845 and prior to March 3, 1873, had adopted the practice of weighing such mails at intervals during weighing periods of thirty-five days each, the total aggregate of all mails carried over any particular route during such weighing period of thirty-five days being divided by the figure thirty as a quotient for the purpose of ascertaining the average daily "size" of the mails so carried. (Finding III, R. 18-20.)

This practice was influenced, no doubt, if not solely dictated, by the fact that at its origin and for many years thereafter, in most instances extending to this date, the greater number of the post-offices in the United States did not operate on Sundays and consequently were not prepared to deliver to or receive from the railroads mails on such days. It is also true that in the earlier days,

if it be not likewise true at present, a considerable number of the railroad companies carrying the mails did not operate trains for such or any other purpose on the Sabbath days, but confined their operations to the secular days of the week, then and ever since until now, in general speech, known as "working days." The weighing period, namely, thirty-five days, then adopted and (until 1905, when changed to ninety) since consistently followed in ascertaining the average daily weights of the mails, carried embraced thirty (or ninety) secular week or working days and five (or fifteen) non-secular, non-working or Sabbath days.

In order "to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States, for the transportation of the mail," and in order to fulfill the duty imposed upon him "to arrange and divide the railroad routes * * * into three classes according to the *size* of the mails," etc., etc. (Act of March 3, 1845, 5 Stats., 732, 738, Ch. 43., sec. 19), "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed" (Act "to Revise, Consolidate and Amend the Statutes Relating to the Post-Office Department," approved June 8, 1872, 17 Stats., 283, 309, sec. 210), it was and still is essential that each railroad com-

pany should be paid, "as far as practicable," for every pound of mail matter which it may carry over its several routes, and as the attainment of perfection in such regard was and is impossible except at great expense and day by day through all the year weighings, the custom known to and sanctioned by the Post-Office Department in including in the total all weights of mails carried on each day whether secular or non-secular, working or non-working, week days and Sundays, and dividing the totals thus arrived at, whether for roads carrying every day in the week, including Sundays, or for those carrying week days only, by the divisor thirty (30) representing the "working days" common to both classes to reach a "statutory," not a mathematical or exact, but an "as far as practicable" average weight of mails per day "carried the whole length of the route," became notoriously established. While previous to 1867 "no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively," in February and March of that year a "railroad weight circular" was issued to all railroads carrying the mails requesting them to weigh for "thirty consecutive working days" and report the results to the Department. The majority of the roads complied with the request, and computations of the average daily weights carried

were made upon these returns (Report, Postmaster General, 1867, pp. 10, 11, 71-91, inclusive).

The practice established and until the promulgation of Order 412 consistently followed by the Department in determining the average daily weight of mails carried by the various railroads over the individual routes, is fully and carefully explained in a letter from the Second Assistant Postmaster General, to whose care such matters are specifically committed by section 18 of the Postal Laws and Regulations, to the Postmaster General, under date of January 9, 1907, in reply to an inquiry from the Chairman of the House Committee on Post Offices and Post Roads requesting to be advised "of the general practice followed by the Post-Office Department in determining the weight of the mails at the various weighing periods under the law, and the method of computations by which the rate for such payment is ascertained."

This letter was read during the course of debate on the bill which became law on March 2, 1907 (34 Stats., 1212) and is spread at large in the Congressional Record of Proceedings in the — Session of the — Congress, vol. 41, part 3, p. 3350.

First stating that for the purpose of weighing the mails the United States had been divided into four sections, in one of which the mail is weighed each year; that when the weights are about to be taken

the Department carefully selects and places weighers in the mail cars and stations who, under supervision, weigh all mails on and off at each station from each train run throughout the weighing period, the aggregate being the total weight on and off all the trains at each station during the period; that calculations based upon such aggregates in connection with the so-called Distance Circular showing distances between the several stations of each route develop the average weight carried over the entire route; said letter proceeds as follows:

> "* * * to determine the average weight of mails per day carried over the entire route the average weight carried over the entire route for the entire weighing period is divided by the number of "working days" (to use the language of the statute)—that is, the number of week days, excluding Sundays, during the weighing period.
>
> "The question as to whether the average daily weight contemplated by the statute is correctly ascertained by the present practice of dividing the total average weight carried over the entire route by the number of week days, excluding Sundays, within the weighing period, or whether the average daily weight would be more correctly determined by dividing the total average weight carried over the entire route by the total number of days, including Sundays, during the weighing period, has frequently been discussed and was recently referred to on the floor of the House. It has been contended by some

that the average should in every case be obtained by using as a divisor the actual number of days in the weighing period. It can not be denied that this would produce an average daily weight for that period, but the question is whether this would produce the average intended by the statute, and in order to ascertain this not only the special language of the statute providing for an annual rate of pay based upon an average daily weight, to be ascertained by an actual weighing of the mails for a certain number of "successive working days," should be considered, but also the history of the manner of adjusting compensation for railroad service which preceded the act of 1873, the extent to which it was incorporated in the act of 1873, and the contemporaneous statements of Postmasters-General with reference thereto.

"When this is done it seems that no doubt can remain that Congress intended that not the whole number of days within the period of weighing should be used as a divisor, but the number of working days within such period. Such examination will show, I think, that under conditions where there are railroad mail routes upon which there is both week-day and Sunday service and week-day service alone, the specific language of the statute requiring a weighing to be had for a number of "successive working days" is practically meaningless unless it governs to that extent the manner of computing the average daily weight. It will also show that the long-established practice of the Department, under the laws which were superseded by the act of 1873, was to classify railroad

service upon that basis; that the law of 1873 in this respect practically adopted the practice which had theretofore so obtained, and that the actual administration of the law from the time of its passage was a continuation of the methods so adopted. * * *

"In order to more accurately determine the "size of the mails" so conveyed, the Post-Office Department issued in 1867 to railroads a "railroad weight circular," requesting them to weigh the mails for "thirty consecutive working days" and report the results to the Department, together with description of accommodations furnished, etc. The majority of the railroads complied with the request (Report of the Postmaster-General for 1867, pp. 10, 11). Computations of the average daily weight were made upon these returns (pp. 72 to 91, inclusive). An examination of the departmental records and reports shows that the instructions were to weigh for "thirty consecutive working days," and that in computing the average daily weight thirty was used as a divisor; therefore, the weights were taken for every day of the period measured by the "thirty consecutive working days," including the Sundays, but the divisor was thirty or the number of consecutive working days.

"The results of this weighing and computation became the basis for the first readjustment by classes, determined by the average daily weight, under the law of 1845. * * * (See Report Postmaster-General, for 1868.)

"At the time of this weighing and first readjustment upon this basis, as well as at all subsequent times, there was a week-day

and Sunday service upon some routes and week-day service only upon others. * * *

"The first weighing under the law of 1873 began October 1, 1873, and was ordered for "thirty consecutive working days." (Report of Postmaster-General, 1874, p. 8.) The returns were received, and the computations and readjustments were made under the provisions of the law (pp. 108 to 183, inclusive).

"In making these computations and adjustments the divisor used was the same as that which had theretofore been used, namely, thirty days. The reports and records for the succeeding years show the same character of weighing and the same manner of computation and adjustment.

"It is apparent from these facts that the same system of weighing the mails and of computing the average daily weight upon the returns for a certain number of "consecutive working days," which had obtained in the Department for years before the passage of the law of 1873, was practically adopted by that law and continued without change in the administration of the same. For this we have not only the logic of the facts, but the statement of the Second Assistant Postmaster General for the year 1878, who states on page 61 of his report: "In 1867 the service rendered by railroad companies was gauged by the system substantially embodied in the act of 1873."

"It should be borne in mind that the whole question of proper compensation to railroads for carrying mails was before Congress at two different times during this

period, upon which occasions reductions in the rates were made. By the acts of July 12, 1876, and June 17, 1878, Congress reduced the rates as provided for by the act of 1873 by a flat reduction of 10 per cent and 5 per cent, respectively. I think it must be assumed that such action could not be taken by Congress without thorough information upon the subject in all its details, including the construction placed upon the act of 1873 by the executive officers and the details of administration, yet the reduction effected was by a flat rate of deduction and not by any change in the law which would necessitate a different construction and practice with reference to the manner of computing the average daily weight. * * *

* * * * * * *

"In the practice of the Department, railroads which do not carry mails on Sunday are held to be entitled, under the decision of the Attorney-General and the long-prevailing practice, to have all mail matter originating and accumulating during Sunday added to the Monday tabulation of weights, for the reason that weighing of the mails must be constructively on working days, and therefore mails carried on Sunday are mails which otherwise would be carried on Monday and which, if railroads did carry on Monday, they would receive *pro rata* compensation for. If any other practice were adopted with reference to this six-day a week service, it is apparent that if Sunday service were inaugurated upon such routes

> and the mails were dispatched upon Sunday trains and thereby reached destination earlier than they otherwise would, notwithstanding the Department would gain by this expedition of the mails, the railroads would lose by having the average weight reduced by a divisor of seven instead of six."

Whatever room for argument there may have been prior to March 3, 1873, as to the quality of the power of the Postmaster General in adopting methods or means of ascertaining the "size" of the mails in classifying same for purposes of compensation, we think no true room for any such argument existed subsequent to that date to and throughout the quadrennial period here in question, for by the act of said date (17 Stats., 556, 558), which crystallized in statute form the practice inaugurated in 1867 and thence continued, the Postmaster General was mandatorily, not directorily, as the Government argues, required "in every case" to ascertain the average weight per day carried the whole length of the route "by the actual weighing of the mails for such a number of seccessive *working* days (not successive days), not less than thirty, at such times * * * not less frequently than once in every four years * * * as the Postmaster General may direct.

It is of course manifestly impossible to weigh the mails for not less than thirty "successive" *working* days without extending such weighings

over a period of more than thirty successive days, and such a period of necessity would include five non-working or Sabbath days on which Sabbath days' mails might or might not be carried according to the practice of the carrier particularly concerned. If no mails should be carried on such Sabbath days then the mails which originated or accumulated on such days manifestly would be incorporated into the mails carried on Mondays and the carrier would advantage by the weight thereof when the total weight carried throughout the period came to be divided by the number of the working days, customarily 30 later and now 90, embraced therein. If any particular road actually carried mails on Sundays, thereby adding something to expedition, it is manifest that unless the weight of such so-called Sunday mails should be ascertained and incorporated into the whole weight carried, the Government would be benefiting by a voluntary and uncompensated service, a result expressly forbidden by the act of March 3, 1905, Ch. 1484, sec. 4, 33 Stats., 1257, amended, February 27, 1906, Ch. 510, sec. 3, 34 Stats., 48, both of which declare that "any person violating any provision of this action (*i. e.*, accepting voluntary service for the Government) *shall be summarily removed from office* and may be punished by a fine of not less than one hundred dollars or by imprisonment of not less than one month," a sad situation for the Postmaster Gen-

eral of the United States to find himself in if the suggestion of some that literalism prohibits the inclusion of Sabbath day weights in "working day" averages, be well founded.

In 1873 and before, it was common knowledge that the weight of so-called Sunday mails as compared with "working day" mails was small, even slight. This did not and does not result from the operation or non-operation of mail trains on such days, but does result from the custom of a God-fearing and religious people to cease from accustomed labors on that first day of the week commonly called Sabbath. But such cessation primarily affects only the origination of mails, for the mail which originated in New York on Sunday becomes an integral part of the Monday or Tuesday mails through Pittsburgh and other intermediate points to Chicago and beyond. All mail routes throughout the country on some day of the week are appreciably affected by the general cessation of both public and private business on that day. As a fair average of daily weights is presumptively the measure of the compensation which the Government intended to pay for the carriage of all the mails, and as the cost of service to the carrier with respect to any specific postal route is approximately the same day by day, whether the weights carried be greater or less, it is plain that the average upon which to base

compensation for service rendered is both unduly and unfairly lessened by including in the statutory divisor of "working days" a non-working day, on which notoriously the machinery of commercial and social intercourse is at rest. In this connection we refer to Executive Doc. 910, 60th Congress, 1st Session, page 21 *et seq.*, which exposes the results of weighings "by classes" for six months, July to December, 1907. From this it appears that the first class mail, that is, letters and post cards, constituted but 12.81 per cent of all mail matter transported, and by 7.29 per cent of all such mail matter with the bags enclosing same and sent therewith. As mail matter originating on Sundays consists substantially if not almost entirely of letters, and those generally of a social character, it is readily perceived that the weight of the mails originating on Sunday would in all probability not exceed—if indeed it even approximates—three (3) per cent of the customary weight of the mails originating on a normal working day.

As casting light both on this wide discrepancy in weight between a normal Sunday and a normal "working day" mail, and also upon the sedulous inclusion by the Congress between 1873 and 1905 of the mandatory requirement that the *average* daily weight carried should be ascertained in every case by the actual weighing of the mails for not less than 30 or 90 "successive working days," we in-

voke the inspiring language of this Court spoken in the case of *The Church of the Holy Trinity vs. United States*, 143 U. S., 457, as follows:

> "* * * this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation. * * *
>
> "Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words, * * *
>
> "If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four (now forty-nine) States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. * * *
>
> "Even the Constitution of the United States * * * also provides in Article I, section 7, (a provision common to many constitutions) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.
>
> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire

people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in Updegraph *vs.* Com., 11 Serg. & R., 394, 400, it was decided that Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania. * * *

"If we pass beyond these matters to a view of American life *as expressed by its laws, its business, its customs and its society*, we find everywhere a clear recognition of the same truth. Among other matters note the following: * * * *the laws respecting the observance of the Sabbath; with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day* (italics supplied).

" * * * * These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." * * *

These solemn and general declarations made advisedly by this Court in the year of Grace 1892 are pertinent and should prove to be most persuasive when coming to finally consider for purposes of construction and interpretation the provisions of the acts of 1873 and 1905.

In this aspect of the matter it would seem that both the Court below and the learned Government counsel have stressed too greatly the matter of

Sunday mail train service, and the relative number of railroads which in 1873 moved mails on Sundays as compared to the relatively greater number of such roads now operating. Such matters, in our view, are wholly irrelevant in any close discussion of the point at issue.

Its immateriality in the instant case is manifest upon considering Finding of Fact wherein the trial Court found that in 1873 "a *majority* of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays," and also found in the second paragraph of the same finding that of the forty-one (41) postal routes operated by appellant and involved in this case "after Order 412 was promulgated and became effective" twenty-four (24) were and are six-day routes while but seventeen are seven-day routes.

In so far as the rights of this appellant to statutory compensation, based upon the average weight of mails per day carried, such average weight to be ascertained in every case by actual weighings for not less than 30 or 90 "successive *working* days" may be concerned, of what consequence is the finding that at the date of promulgating Order 412, *i. e.*, June 7, 1907, "over a majority of the railroad postal routes mails were being carried every day in the week." Such fact, if true, could not have the

effect of enlarging the statutory phrase, "successive working days," identical in both the act of 1873 and of 1905, to include days which in ordinary speech and to the common understanding are not "working" days.

As said elsewhere by others, if the Congress had intended that "the whole number of days included in the weighing period" (either 35 or 105) should be used as the divisor to obtain the average daily weight of mails carried, it would have been sufficient and shorter to have used only "successive days" omitting all reference to the qualifying adjective "working." As the adjective or qualifying word was reiterated by the Congress in spite of some objection and much debate it would be to ignore a familiar and fundamental rule of statutory interpretation to refuse to accord it not only recognition but its well-established meaning.

It constitutes a term of art—familiar to judicial tribunals through long usage, frequently appearing in solemn documents and well understood by a religious people at large.

## THE STATUTES.

The act of March 3, 1845 (5 Stats., 738), which first imposed upon the Postmaster General the duty of arranging and dividing the railroad routes into the three classes above specified, expressly declared

that such duty was so imposed "to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail." A requisite element of inclusion in the "First Class," under the practice of the Post-Office Department, established in connection with said act of 1845 and since continued to the present time, was a basic service of not less than six round trips per week, or an average of at least one round trip for each and every secular or working day in each and every week, and consequently at least one round trip for each and every secular or working day in each and every year. This practice and the custom based thereon also involved, as another essential element, the agreement by the Postmaster General to pay and the actual payment by him to the railroad companies of the first class of the highest rate of pay or compensation provided and allowed by the current law for a service of not less than six round trips a week, the remaining elements of "speed" and "importance" being likewise present. The practice and custom so established persisted throughout the period covered by the findings of fact in this case. As reported by the Postmaster General to the Congress in 1867, no very definite attempt had been made up to that time to ascertain with reasonable certainty the "size" of the mails transported.

To arrive at this, the then Postmaster General issued to the railroad companies transporting the mails a so-called "weight circular," at the same time requesting the companies to weigh all mails carried by them "*for thirty consecutive working days*" (italics supplied), and report the results to him. The practice of ascertaining the size or average daily weight of mails carried thus originated and established, persisted and continued despite occasional question, until promulgation on June 7, 1907, of the Departmental Order No. 412, hereinafter referred to. From the date of its origin to date of enactment of the statute of March 3, 1873 (ch. 231, 17 Stats., 558), its modification and possibly the elimination of one or more of the elements adopted by the Postmaster General under the authority conferred upon him by the act of 1845, as bases for classification of the various railroad companies transporting the mails, might have been discretionary with him. But we venture to think that, upon the enactment of the act of 1873, such discretion in so far as it had formerly extended to the method of ascertaining "size," disappeared with the elimination by that act of the previously existing duty to divide such companies into three classes.

The element of "speed" in the act of 1845 became translated in the act of 1873 into the composite requirement of "due frequency and speed," and the

separate elements of "size" and "importance" were resolved into the composite expressed as the average weight of mails per day carried the whole length of the particular route. But, while the act of 1873 provided "that the pay per mile per annum shall not exceed" certain amounts expressed in dollars on routes carrying their whole length an average weight of differing numbers of pounds, thus conferring upon the Postmaster General a discretion to make contracts at rates less than the maxima stated in the statute, if he should be able so to do (Eastern Railroad Co. *vs.* United States, 20 Ct. Claims, 41 affirmed 121 U. S., 391; see also opinion, per Campbell, Ch. J., on Chicago & Alton Case, 49 C. of C.), the previous discretionary method of ascertaining the "size" of the mails carried became crystallized in the statutory rule which required "the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June 30, 1873, and not less frequently than once in every four years, * * * as the Postmaster General may direct."

The United States do not deny that the definition "due frequency and speed," since the enactment of the statute of 1873 to the present time, has been held in the Post-Office Department entirely

satisfied by a basic service of "not less than six round trips per week." Nor do they deny that from the date of the enactment of said statute even as theretofore, and until the promulgation of said Departmental Order on June 7, 1907, the practice of the Department in ascertaining the average weight of mails per day carried throughout the whole length of any particular route was invariably to ascertain by actual weighings the aggregate total in pounds of all mails so carried during certain so-called weighing periods consisting of thirty-five, or, as later, one hundred and five, successive days, and to divide the aggregate total weight so ascertained by thirty or ninety, as representing the total number of *successive working days* included within such respective weighing periods. In compensation for such a service, the maxima prescribed by law were uniformly applied to the *statutory average* weights per day carried thereby ascertained thus establishing the rate of compensation to be paid therefor, no note being here taken of the occasional and unusual services called "agreement" service, "blue tag," "lap," and "equalization" services.

The change in the practice of ascertaining the average weight per day carried, from a weighing period of "not less than thirty" to a weighing period of "not less than ninety," was brought about by the enactment of the act of March 3, 1905 (33

Stats., 1088), which declared "that hereafter, before making the readjustments of pay for transportation of mails on railroad routes, the average weight *shall be ascertained* by the actual weighing of mails for such a number of *successive working days,* not less than ninety, and at such times after June 30, 1905, and not less frequently than once in every four years * * * as the Postmaster General may direct." (Italics supplied.)

Apart from the provisions of the act of March 3, 1875 (ch. 128, 18 Stats., 341), which directed the Postmaster General "to have the mails weighed as often as now provided by law *by the employees of the Post-Office Department,* and to have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-Office Department and the railroad companies," and the act of July 12, 1876 (ch. 179, 19 Stats., 79), which directed the Postmaster General to readjust the compensation to be paid after July 1, 1876, "by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates *fixed and allowed* by the 1st section of" the act approved March 3, 1873 (*supra*), "for the transportation of mails on the basis of the average weight," and the act of June 17, 1878 (ch. 259, 20 Stats., 142), directing the Postmaster General to readjust compensa-

tion to be paid after July 1, 1878, "by reducing the compensation of all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight *fixed and allowed* by the 1st section of" the act approved July 12, 1876 (*supra*), no pertinent legislation intervened between the acts of 1873 and 1905 referred to.

The attempt on the part of the Postmaster General by Departmental Order 412 to alter this method, long established both by statute law and practice, of ascertaining the average daily weight of mails carried, crystallized as it had come to be by at least three separate exercises of legislative authority, was an attempt on the part of the Postmaster General to do that which he had no legal power or authority to do, and the concrete expression of such attempt as formulated in Order 412, was and rightly should be held to be without valid effect upon the relations between the United States, acting through the Department, and this claimant respecting the amount of compensation to which the latter is entitled for the transportation of the mails during the term 1909-1913.

For at least six years prior to March 3, 1873, that is from February or March, 1867, the method of ascertaining the average daily weight of mail carried throughout the whole length of the route, by weigh-

ing all mails carried in each direction on every day including Sundays, when carried on that day, and dividing the aggregate total by the number of working or secular days only, never including Sundays, embraced in the weighing period then of thirty-five days, had prevailed. This customary, and as we think invariable practice, was well known to and sanctioned by the Department officials charged with the official duty of administering the then mail pay appropriations. The accounting officers for the Post-Office Department and of the Treasury never interposed objection to it. The "average daily weight of mails carried" so ascertained was the foundation or keystone of the whole mail pay system, for much less consideration was paid to the items of "speed" and "importance" than to "size" and the consistent custom of the Department from the early days was to pay in each case the maximum amount authorized for the particular class, whether "first," "second," or "third." The reasonableness of this method as tending to give to the carriers an "equal and just compensation, according to the service performed," in accord with the policy of the Congress declared in the acts of March 3, 1845, and June 8, 1872, had become so fully demonstrated to the satisfaction of both the Department and the Congress, that the latter, acting upon the reports and recommendations of the former, enacted the act of March 3, 1873 (incorporated in

the Revised Statutes as section 4002), substituting "due frequency and speed" in place of "speed" and "importance," and "average weight of mails per day" carried the whole length of the route for "size," and required such "average weight to be ascertained *in every case*, by the actual weighing of the mails for a number of successive *working* days, not less than thirty," etc., etc., and subsequently enacted the act of March 3, 1875, ch. 128, 18 Stats., 341, which directed the weighings to be done "by the employees of the Post-Office Department," and the weights so ascertained to be "stated and verified" by such employees to the Postmaster General "under such instructions as he may consider just to the Post-Office Department and the railroad companies."

Excepting only for the enlargement of the weighing period by the substitution of "ninety" in place of "thirty" which was done by the act of March 3, 1905, 33 Stats., 1088, the Congress of the United States not only failed to enact any legislation in anywise tending to amend or alter either the act of 1873 or 1875 or the established custom and practice of the Post-Office Department officials specifically charged with the administration of all such laws, but as further manifesting its perfect understanding and appreciation of the situation as it had existed and been continuously handled for a

period of more than a third of a century, when urged to amend the earlier statutes or by enactment to alter the established custom and practice followed in their administration, as it was repeatedly urged to do, it definitely and positively, as amply appears from public documents, particularly reports of its committees, refused to do so. Under those laws, customs, and practices the quotient arrived at and used as evidencing the "average weight of mails per day" carried, was from the beginning and without interruption until June, 1907, continued as the very basis of railway mail pay adjustment and compensation. Such quotient by statutory definition was the equivalent of the "average" daily weight carried. The fact that the statutory "daily average" differs from the mathematical "daily average" is of no consequence, for the rights and obligations of the parties here rest upon and inhere in the statute and do not depend upon arithmetical precision or the usage of rhetoricians.

This departmental and statutory method of ascertaining the "average weight of mails per day" carried, which persisted without variation from 1873 to 1907, constituted not only a component element, but the very basic element, of compensation in every contract between the Postmaster General and carriers transporting the mails, excepting only

some occasional contracts specifically evidencing the intention of the parties thereto to secure and perform service upon other or different bases than those fixed and prescribed by the general statute law and practice. The case at bar presents no such feature.

Even more specific and definite recognition and confirmation by Congress of this custom of the Department and of the construction and application made by it of the acts of 1873 and 1875 in practice, is found in the provisions of the act of July 12, 1876, 19 Stats., 79, "reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates *fixed* and allowed by the first section of" the act of 1873 above, and in the act of June 17, 1878, 20 Stats., 142, again directing the Postmaster General to reduce the compensation to be paid to railroads transporting the mail after July 1, 1878, by "five per centum per annum from the rates for the transportation of mails, on basis of the average weight *fixed* and allowed by the first section of" the act of 1876 next above referred to. In these statutes the then and previously current bases of the compensation to be allowed and paid to railroad companies by the Post-Office Department are defined as the rates "fixed" and the average weight "fixed" in and by the earlier statutes specified.

Conceding, for the purpose of this argument, that neither the act of 1873 nor all of the statutes above specified as amendatory thereof, nor the invariable custom and practice of the Department existing between 1873 and 1907 in administering the same, nor all thereof combined, established an absolute rate of compensation, but merely maxima which could not be exceeded, leaving to the Postmaster General a discretion to make contracts at less than such maxima if he should be able to do so, it is certain that such discretionary power inhered in and pertained to the single element of the maximum applicable in any particular contract, and did not at all inhere in or pertain to the method to be pursued in ascertaining the average daily weight of mails carried to which as a basis the rate agreed upon, whether the maximum or less, was to be applied in arriving at the annual compensation to be paid.

As said by the Court of Claims in its learned opinion, filed in the Chicago and Alton Case (49 C. of C., 463), at page 502, analyzing the act of 1873:

> "We find * * * (3) that a scale of maximum rates is given to be based upon the average obtained from actual weighings 'in every case,' for 30 or more successive working days; (4) that a rule for ascertaining an average weight per day is provided. This last marks a departure from the older law wherein no method of ascertaining 'the size

of the mails' is provided, though it was required by the act of 1845 that it enter into the Postmaster General's computation in fixing pay for the service. It was as impracticable in 1873 and the years following to ascertain the size of the mails or their weight as it had been in prior years, except by constant weighings; and as the weight carried was necessarily considered a material element, a plan was adoptd which was at once practicable and fair to the parties concerned. This plan amounted to discarding the idea of actual weights by providing a contract basis to be an average ascertained by a rule stated in the statute; and it will be observed that the statute directs the average weights to be ascertained 'in every case' by that rule.

"With the average weight carried daily throughout the route ascertained, the length of the route known, the right to 'increase compensation' given, and the maximum rate named, the Postmaster General was prepared to submit his proposal to each road with the conditions and terms provided in the act. Among the conditions named were that the mails be carried with 'due frequency and speed,' and that proper and suitable mail cars be provided.

"He was given a limit as to compensation to be paid, maximum rates being stated, and his contract was to be based upon an average weight of mails per day carried the whole length of the route and the ascertainment therefrom of the average weight carried per mile per annum.

* * * * * * *

"Since the statute mentions working days, some meaning should be ascribed to the terms. It would have shortened the phrase to have omitted the word 'working,' but it was inserted. Working days generally refer to secular days; that is, they exclude Sundays. It was said in a case involving the use of the term in a charter party: 'The expression "working days" has in commerce and jurisprudence a settled and definite meaning; it means days as they succeed each other, exclusive of Sundays and holidays. The court gives this precise and formal definition in Brooks *vs.* Minturn, 1 Cal., 483.' Pederson *vs.* Engster, 14 Fed. R., 422; Field *vs.* Chase (N. Y.), Lalor's Supp., 50. Working day is a day in which work is generally done in distinction to Sundays or holidays. Webster's Dict. We may not find an entirely satisfactory reason for the use of the expression in said connection, and it is immaterial what the reason was if the meaning be clear. Congress certainly had the right to use it, and did so. At that time (1873) there were a great many more railroad routes carrying the mails six days per week than there were carrying them seven days per week. We are told the proportion was then 7 to 1, a condition very much changed since. It way, therefore, be that Congress recognized that by using the working days—or excluding Sundays—for weighings it was adopting days common to all the roads, and thus securing an average weight fairly representative of the service of all, the daily average being the factor desired. Or it may be that the suggestion was made that the railroads were

operated under charters granted by the States, which might claim the right to regulate or prohibit the running of Sunday trains, and that the authority from Congress to weigh the mails on Sundays might be construed as legislation by Congress in reference to the mails, a matter peculiarly within the province of the Federal Government, and as thereby interdicting any interference by the States with railroads operating their trains on Sundays while carrying the mails. Whatever the reason, Congress directed that the mails be weighed for such a number of successive working days, not less than 30, as the Postmaster General might direct.

"Having in mind the fact that prior to 1873 much difficulty had been experienced in determining 'the size of the mails'; that actual weights could only be found by constant and actual weighings, which would be so expensive and inconvenient as to amount to impracticability, and that it was essential to have a basis upon which contracts for terms of four years could be made, *we can see a reason for adopting the plan of ascertaining an average weight and accepting that instead of actual weight.* * * * It should be borne in mind that the evident purpose of the statute was to furnish a plan whereby the average weights in distinction to actual weights could be found; that it was adopting a method under which the Government would be willing to make contracts extending for a long period; that certainty, even though based upon average weights, was preferable to uncertainty resulting from any other method; that this certainty of

average weight would furnish a basis for estimates for appropriations relieving the uncertainty of estimating weights or the variableness of actual weights; and that it therefore provided a plan and furnished a rule which, *if literally followed,* would determine the (statutory) average weight per day.

"The statute authorized a readjustment of the compensation upon 'the conditions and terms' mentioned therein. One of these conditions is that in the matters of weights the statutory rule shall be used to find the average weight of the mails carried per day. The aggregate of 'the actual weighings of the mails for such a number of successive working days not less than 30 * * *,' as the Postmaster General may direct, furnishes the dividend, the number of successive working days so used furnishes the divisor, and the quotient is of course the (statutory) average daily weight of the mails carried on said days.

"At this point it is suggested by claimant that the foregoing rule might serve for six-day roads, but works an injustice to routes carrying mails every day of the week. Because, it is said, when the mails carried by six-day roads are weighed for 30 successive working days, it means that all of the mail carried throughout the week by such roads goes to make up the average—Sunday's accumulation going into Monday's mail and weight; while the seven-day roads carrying mails on Sunday do not get the benefit of its weight in this average. At first view this contention may seem to have merit, but in

reality it is unsound when the whole statute is considered.

"Congress knew when it enacted the statute that some routes were seven-day and some six-day routes, and yet it provided a rule which it declared should be applied 'in every case' by actual weighings of the mails for a number of successive working days. But chiefly the vice of said contention is that, in order to show the supposed inequality produced by the rule stated specifically in the statute, the emphasis is laid upon the wrong feature. The statute itself considered as an entirety answers the contention, for it provides that, among the terms and conditions upon which the mails are to be carried, there shall be prominently considered the 'frequency' with which they are conveyed and that the price to be paid shall be within a named maximum price. In other words, the latitude given the Postmaster General within which to 'readjust' the compensation so as to comply with the terms and spirit of the act of 1873 is not found in a disregard of the rule for finding the average weight, but is found in the price to be paid. He may pay on the basis of 'due frequency' of carriage to seven-day roads a larger amount for the average daily weight per mile per annum than he pays a six-day road. He may pay one for 365 days and the other for 313 days per annum. And this can be done because of the flexibility of the provisions fixing the compensation without doing any violence to any terms of the statute."

Whatever latitude respecting "rates" based on "due frequency" may have been reposed by the statute of 1873 in the Postmaster General, it is certain that he did not exercise same, at least up to 1907, for the purpose of distinguishing in matters of compensation the service of the seven-day roads from that rendered by the six-day roads. As is cordially admitted by the United States, and as is clearly demonstrated by numerous reports, the element of "due frequency and speed" was to and throughout the period with which this case is concerned uniformly held satisfied by a service of six round trips per week. With this feature or element of the formula for deducing the amount of compensation to be paid, the Congress did not concern itself when enacting the *proviso* to the act of 1905.

It may well be conceded, as it must be from a mere reading of this proviso, "that Congress was not satisfied with the average weights being ascertained, * * * and they therefore changed the law to insure a more satisfactory average," but the change required was particularly "cribbed, cabined and confined." It lengthened the period of the weighings, but made no change either in the elements to be considered or in the manner of their ascertainment.

It is certain that an amendatory statute designed to change *a feature* in or practice under an older act

should be construed so as to give it the effect intended, but when the amendatory provisions deal only with one of the several features inhering in the older act, it is equally certain, upon fundamental principles of statutory construction, *e. g., expressio unius*, etc., that the alteration defined leaves all other elements as they were.

Though the weighings were to be conducted over a longer period, the average weight to which the statutory maximum was to be applied in determining the annual compensation remained as theretofore, to be (shall be) ascertained by the statutory rule of dividing aggregate totals, not by the whole number of successive days upon which weighings were had but only by the "number of successive working days" not less than the statutory "ninety" embraced in the weighing period.

**Refusal of Appellant to submit to the terms of Order 412 was formally communicated to the Postmaster General prior to rendering any of the service here involved and such refusal was not subsequently withdrawn or qualified.**

But conceding *arguendo* that discretion as to the "rates" remained with the Postmaster General, and that upon the basis of "due frequency and speed" differing rates within the maxima prescribed by the statute might have been agreed upon between the parties, same being acceded to by the railroad, where lies the right of the matter when the

carrier in ample season has declined to contract at any "rate" less than the maximum to be applied to an average daily weight carried ascertained in accord with the previously accustomed practice of the Department?

In the Chicago and Alton case (*supra*), it was found that although notified by the Postmaster General in February, 1907, of intention to apply after July 1, 1907, a lesser rate than had theretofore prevailed, the carrier, beginning July 1, 1907, continued to receive and transport the mails as previously, without refusal or objection until September 16, 1907, when, upon returning the Distance Circular with acceptance clause duly signed, it casually excepted to the application of Orders 165 and 412, the latter being, in fact, a mere substitution for the former.

October 3, 1907, the Second Assistant Postmaster General, in writing, by way of reply, stated that claimant "in the performance of the service from the beginning of the contract term and during the continuance of the service, would be subject to all the postal laws and regulations," including Order 412, and payments thereafter were made and accepted by claimant upon such basis. Upon this point the Court of Claims said:

> "Conceding for the sake of argument that the claimant could have objected to Order 412, we think the objection should have been

timely and that some effect should be given to its action in entering upon the performance of the contract for carrying the mails without objection made before July 1, 1907, when the contract period commenced, if indeed the letter of July 1, 1907 (September 16, 1907), can be construed to be an objection. By holding the distance circular until September, and then returning it with 'exception' noted, claimant waived any right of objection, not only upon the principle stated in Philadelphia & Baltimore R. R. Co. *vs.* United States (103 U. S., 703) and Texas & Pacific R. R. Co. Case (28 C. Cls., 379), wherein it is said, 'The contract could not be changed by complaints and protests,' but also upon another principle, namely, that where an offer is made by one party its acceptance by the other may as well be signified by doing acts which clearly show assent as by express words, especially when there is a duty on the part of such a party to make known his unwillingness to proceed under the contract. 'If such acts are done with the knowledge of the party making the offer, they amount to an acceptance thereof.' * * * Vogel *vs.* Pekoe, 157 Ill., 339; 30 L. R. A., 493, where it is said: 'The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part.' "

In the absence of some controlling provision of law restricting the powers of one or other of the parties to a particular contract it would be futile

to deny or even attempt to argue away the reasonableness and authoritative quality of the principles of law so cited. That it was and is entirely competent for the Postmaster General in letting contracts for carrying the mails to attempt, by agreement, to secure the service at rates less than the statutory maxima we do not doubt. That an offer of business coupled with a statement that the rate of compensation to be paid for its performance would be less than the maximum rate prescribed by applicable statutes, and the acceptance of such an offer, either in writing or by performance of the business without objection made to the terms offered, would be sufficient to establish contractual relations between the parties, under which payment of compensation at less than the statutory maximum would constitute complete discharge, is no less certain. But the case now at bar does not involve any such proposition. Here the offer of business was at rates of compensation to be made at statutory maxima, but coupled with the proviso that the average daily weight of the mails carried should be ascertained in a manner other than that prescribed and required by such statutes to be used "in every case." In so proposing the Postmaster General, under the familiar rule of adjudged cases, Morril *vs.* Jones, 106 U. S., 466; United States *vs.* Eaton, 144 U. S., 677, exceeded his lawful powers, and such proposal

could neither bind those engaged in the performance of a service or duty prescribed by the statute, nor serve as a defense against an action to enforce the statutory duty to pay. In the Chicago and Alton case there was seeming acquiescence on the part of that company in the application of Order 412, though its provisions were unwarranted by statute, and such acquiescence was deemed by the Court of Claims to estop the company from thereafter protesting the effect of its own course of conduct. But no such consideration can arise here, for at the very first stage and long before the beginning of the quadrennial period—that is, prior to July 1, 1907—claimant had refused to be bound by what it was then advised and still believes to be an attempt on the part of the Postmaster General to himself amend a duly enacted law of the United States. For administrative officers of the Government so to undertake is not entirely without precedent in political history. But their inability to accomplish any such undertaking, when timely objection is made by one interested, is demonstrated by the cases last above cited.

The Railway Mail Service cases, 13 C. of C., 199, which involved questions as to the amount of compensation properly payable to a railroad company operating "lap service," or two distinct postal routes over the same portion of its main line

between one terminal and a junction point, establish the principle that a company transporting mails under the act of 1873, "and accepting without objection less compensation therefor than is named in the statute," cannot subsequently recover the difference between the amount received and the statutory maximum allowable. Such conclusion is readily to be accepted, for, under the circumstances defining those cases, the tender and acceptance of the lesser amount constituted in effect an agreement to perform the specified service, which was an unusual or abnormal service, for less than what the statute declared normal service to be reasonably worth. The power to deal and contract, as above indicated, was well within the domain of the discretionary power concededly confided by the statutes to the Postmaster General. As no time contract covering the "lap service" there in question had been executed by the parties, the court further declared that from the date upon which the company announced its objection to the course theretofore pursued by the Department and acquiesced in by the company, payment should have been made at the rate prescribed by the statute as the allowable maximum, notwithstanding the company thereafter continued to perform service and accepted pay at the lesser rate which the Department had fixed; and judgment went in

favor of the company for the difference between the two.

The conclusion reached in Texas & Pacific Railway Company case, 28 C. of C., 379 (also a "lap service" case), though adverse to claimant and resulting in the dismissal of its petition, does not militate against the principles announced in the Mail Service cases (*supra*), for there the terms of the agreement were in writing, had been made "with a full understanding of the manner as to how the pay was to be adjusted," and the complaint subsequently made by the company against them had been formally withdrawn during performance. In disposing of the matter the court said (p. 389):

> "The company was under no obligation to perform this service for any agreed period and could have refused to take the mails at any time. Complaining of the injustice of the contract (sic) did not annul it nor make another and different one in its place."

The court found that any protest or objection made by the company as to terms had been withdrawn by subsequent writings, and it having been fully paid in accord with its agreement as made, could not thereafter maintain its action to recover more than it already had received.

**Appellant Not Estopped by Receipt of Partial Payments During Performance of the Service.**

In support of the proposition that claimants are not estopped from enforcing their demands in such regard by reason of having settled their accounts and accepted pay for service rendered upon a different basis, we cite in addition to the above the following:

Brown *vs.* Wheeler, 17 Connecticut, 345.
Rangely *vs.* Spring, 21 Maine, 130.
Jersey City *vs.* State, 30 N. J. Law, 521.
Johnson *vs.* United States, 5 Massachusetts, 425.
Newman *vs.* Edwards, 34 Pennsylvania St., 32.

**In the absence of express Contract the Statutes cited, together with the statutory average of daily weights carried, furnish the true measure, both of defendant's liability and the carrier's lawful due.**

Appellant through a period of years prior to 1908 had been performing service over the routes specified in its petition upon the terms prescribed by law and in strict accord with the then current orders and regulations of the Department. In the course of such performance, the Second Assistant Postmaster General on or about August 17, 1908, circulated the familiar Distance Circulars preparatory to the quadrennial period to begin

July 1, 1909. By letter of advice accompanying same he called attention to Order 412 and gave notice of intention to apply same in adjusting compensation for service to be performed during the quadrennial period then next approaching. Pursuant to the orders of the Department the weighings were effected over all routes specified in the Findings during the one hundred and five days beginning August 26, 1908. After the weighings had been completed claimant returned the Distance Circular completely filled in with data requested as to names of stations, distances between stations, junctions and the like, but unsigned as to its acceptance clause. With this Distance Circular thus partially executed claimant forwarded a separate writing bearing date of Novemebr 24, 1908, reading as follows:

> "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the existing regulations of the Department applicable to railroad mail service, excepting Order No. 412, issued by the Postmaster General, June 7, 1907. This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight perscribed by said order, and reserves the right to insist on payment according to the methods of computing the average weight applied by the Department prior to the is-

suance of order No. 165, issued by the Postmaster General, March 2, 1907."

"W. H. NEWMAN,
*"President.*

"Dated Nov. 24, 1908.

"New York Central & Hudson River Railroad Company. Consolidated Nov. 1, 1869."

This clearly constituted refusal to perform service upon the terms offered.

On January 5, 1909, the Second Assistant Postmaster General replied to such refusal as follows:

Post-Office Department,
Second Assistant Postmaster General,
WASHINGTON, January 5, 1909.

Messrs. Thompson & Slater, Attorneys New York Central & Hudson River Railroad Co., Washington, D. C.

GENTLEMEN: This office is in receipt of your letter of January 2nd, accompanied by distance circular covering the following routes:

104025, Boston, Mass., to Albany, N. Y. * * * (specifying others) * * * all being for the term beginning July 1, 1909, and ending June 30, 1913.

Note is taken of the modification made by you in the agreement clause in which you except Order No. 165, issued by the Postmaster General March 2, 1907, and Order No. 412 issued by the Postmaster General

June 7, 1907, and otherwise agree to perform service under existing regulations. In regard to this, I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term to this service.

Very respectfully,

JOSEPH STEWART,

*Second Assistant Postmaster General.*

This plain declaration of purpose was entirely capable of being officially adhered to if the Postmaster General chose so to do, for plainly a carrier cannot compel the letting to itself upon its own terms of a contract for mail transportation.

To this declaration of purpose complainant made no reply and the matter rested as it had before the declaration was made. If the essentials of contract were absent before this declaration of purpose of January 5, 1909, was made, as they clearly were, for there had been no consent on either side, equally clearly they were not supplied by the silence with which claimant met the Postmaster General's emphasized repetition of intent to compute compensation only on the basis of Order 412.

It was for the Postmaster General acting upon his own appreciation of the extent of his lawful powers to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit. By its notice of November 24, 1908, the company's stand and purpose was as simply and plainly, and hardly less emphatically stated than was that of the Department in its reply of January 5. The negotiations, having reached an *impasse,* ended then and there with no contract agreed upon and each party free to pursue its separate way.

Even though in one aspect claimant's communication indicated willingness to perform the service upon other terms, such condition was rejected by the Department and acceptance of terms by either party, an essential to the establishment of any contract, cannot be spelled out of the correspondence between them.

Jordan *vs.* Norton, 4 M. & W., 155.
Routledge *vs.* Grant, 4 Bing., 653.
Duke *vs.* Andrews, 2 Ex., 290.
Lucas *vs.* Martin, 37 Ch. D., 597.
Eliason *vs.* Henshaw, 4 Wheaton, 225.
Bruce *vs.* Pearson, 3 Johnson, N. Y., 534.
Allen *vs.* Kirwan, 159 Penna. St., 612.
Weaver *vs.* Burr, 31 W. Va., 736.
Sc. 3 L. R. A., 94.
Corcoran *vs.* White, 117 Illinois, 118.
Lawson, Contracts, sec. 16.

Clearly no express contract had been completed between the parties and no further attempt was made on either side to effect one. The silence which attended receipt of the Second Assistant Postmaster General's letter of January 5, 1909, remained unbroken. Claimant continued performance of its then current contracts to June 30, 1909, and in ordinary course was paid according to law and the terms of such contracts. July 1, 1909, without more said the Postmaster General caused the mails of that day to be delivered at claimant's receiving stations and claimant without demur, recognizing their importance to the commercial and social world and its own relation thereto and reasonable duty in the premises, received, transported and made customary delivery thereof.

A new service was begun, without contract or particular agreement between the United States and appellant. Contractual relations arose out of the service performed, and the implied agreement is to pay its reasonable worth. This is established by the statutes and the antecedent practice thereunder.

It is suggested on part of the defendant, that out of its positive announcement that it would "not enter into contract with any railroad company" which refused to be bound by "any postal law or regulation" and that "it must be understood that

in the performance of service" claimant would "be subject," as in the past, to all the "postal laws and regulations which are now or may become applicable during the term," a renewal of the original offer which claimant had positively refused to accept should be deduced, and that the occurrences subsequent to July 1, 1909, then practically six months distant in time, with no intervening communication being had between the parties, should be taken as an acceptance thereof. Such an assumption, we venture to think, would be unwarranted in fact and cannot be demonstrated as matter of law.

In some cases acceptance of offer may be proved by consequent acts without more, but acts alone will not constitute acceptance where the party to be bound has expressly stated that he would not agree to the terms offered, *e. g.*, where one has notified another by letter that an apparatus would be removed unless that other agreed to hire its use for $20 per annum, and the other replied that he would not pay more than $10. Held, that the continued use of the apparatus did not constitute an acceptance of the offer or give rise to obligation to pay for such use at the higher rate.

Lamson, etc., Co. *vs.* Neil, 15 Daly (N. Y.), 498;
29 N. Y. St., 307.

Mere silence or failure to reply to an offer in writing will not constitute or tend to establish acceptance of offer,

Titcomb *vs.* U. S., 14 C. of C., 263.
Prescott *vs.* Jones, 14 Atlantic R., 352.
Royal Ins. Co. vs. Beatty, 119 Pa. St., 6; 2 Am. St. R., 622.
Rayson *vs.* Berkeley Co. R. Co., 26 S. C., 610.
Belthouse *vs.* Bindley, 11 C. B. N. S., 869.

Subsequent to July 1, 1909, plaintiff received from the Second Assistant Postmaster General a communication in writing, as follows:

*Notice to Company of Adjustment of Pay, Including R. P. O.*

Division of Railway Adjustments.

D. H. M.

Post-Office Department.
Second Assistant Postmaster General.

WASHINGTON, July 1, 1909.

SIR: The compensation for the transportation of mails, etc., on Route No. 104025, between Boston, Mass., and Albany, N. Y., has been fixed from July 1, 1909, to June 30, 1913 (unless otherwise or-

dered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing Aug. 26, 1908, at the rate of $305,253.67 per annum, being $1,523.45 per mile for 200.37 miles, * * *

No reference was made in this communication to Order 412, and as it was expressly declared that the compensation for the service to be rendered from July 1, 1909, to June 30, 1913, was based and fixed upon the statutes specified and "upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing August 26, 1908," no intimation that Sundays had been included in the divisor being given, claimant had no cause or reason to complain of or offer objection to the form of the notification.

Subsequent to July 7, 1909, claimant likewise received railway pay orders in the usual form which made no reference to Order 412 and furnished no data purporting to indicate that the previous practice of the Department in computing the pay per annum per mile had been departed from.

On the contrary the context of each of such papers, taken as a whole, seemed to express com-

plete acquiescence by the Department in appellant's contentions.

That such was not the case could only have been ascertained upon comparison of the rate in dollars per mile specified as the basis of pay with the total gross weights carried, which was not stated in any of those papers.

Throughout the entire period ending June 30, 1913, claimant rendered the service requested and prescribed in said pay order. Having ascertained that the figures contained in such order did not in fact accord with the promise of the statutes cited in the notification of compensation as fixed, but were in fact the result of an application to the statutory promise of the formula supplied by Order 412, claimant brought this suit to recover the differences due it, basing its right so to do upon the obligation and promise of the statutes themselves.

In the circumstances the United States, upon familiar principles, frequently applied in this forum, became obligated to pay what the service which it had requested to be performed for its own benefit, was reasonably worth. The origin of such obligation is readily found in the statutes which have already been referred to with much reiteration, and the duty to pay in accord with such obligation is statutory and can neither be gainsaid nor

frittered away. The rights and obligations of the parties were quasi contractual.

The statutes above cited and the uniform practice and custom of the Department for more than thirty years in applying them in daily and hourly practice furnish all the guide and rules necessary for the formulation of judgment herein. The statutory declaration of specified maxima is a plain index of the legislative understanding and appreciation of what in the particular circumstances and in the absence of Departmental dickering or mutual assent, constitutes reasonable compensation. Claimant had for many years previous to July 1, 1909, been rendering the identical service upon the identical routes and had been paid therefor upon the bases prescribed by the statutes, and expressly assented to by the Postmaster General as well as by itself. In such circumstances we turn with confidence to the principles announced by this court in the Eastern Railroad Company's case, 20 C. of C., 23, wherein Chief Justice Richardson, speaking for the court, having first declared (p. 41) that R. S. U. S., 4002, embodying the act of 1873, did not establish "an absolute rate of compensation, necessarily alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a dis-

cretion to make contracts at less rates if he should be able to do so," said (p. 42):

> "Much reliance on the part of the claimant is placed upon the opinion of the Supreme Court in the case of Railway Co. *vs.* United States (101 U. S. R., 543). But in that case no question was involved as to whether or not there was a contract for a definite period of time. That action was brought by the United States against a railroad company to recover a tax imposed by statute on 'every * * * corporation owning * * * any railroad * * * engaged or employed in * * * transporting the mails * * * upon contracts made prior to August 1, 1866.' The Supreme Court say:
>
> "'No express contract for carrying the mails was proven, but since the service for which the compensation was paid began before August 1, and was continued without interruption for the whole term in question, the court below implied a contract prior to that time. This, we think, was right. Had payment been refused and suit brought against the United States in the Court of Claims to recover for the service rendered, there could be no doubt about the right to recover, notwithstanding the jurisdiction of that court is confined to suits on contracts (Salomon *vs.* United States, 19 Wall., 17); and this not alone because the service had been rendered, but because it is to be presumed that when the company commenced the transportation it had been agreed that payment should be made for what was done.'
>
> "So in this case it is to be presumed that

> when the company commenced the transportation of the mails, July 1, 1877, it had been agreed that payment should be made for what was done and nothing more. So long as the Postmaster General furnished the mails and the claimant continued to carry them, an implied contract existed, which might be terminated at any time by either party. The implied compensation was the reasonable worth of the service, and that might be measured by the previous dealings of the parties for like service and the statutes regulating the same. The maximum rate fixed by statute would no doubt be considered the reasonable and implied compensation until the Postmaster General should make other terms, with the concurrence, express or implied, of the claimant."

This case was cited with approval in Jacksonville, Pensacola & Mobile R. Co. *vs.* United States, 21 C. of C., 155 (affirmed, 118 U. S., 626), where it is said:

> "There is some difference between the land-grant railroad companies and other railroad companies as to their obligations in carrying the United States mails which has been mentioned in decided cases and which it may be well to note.
>
> "While the land-grant companies are bound to transport the mails at prices fixed by Congress, those roads which are aided with bonds are entitled to fair and reasonable compensation not in excess of the rates paid to private parties for the same kind of

> service. (Union Pacific Railway case, 20 C. Cls. R., 70.) But both are obliged to perform the service. Other companies are not bound to perform the service at all against their will. When they perform service without express contract their compensation depends wholly upon implied contracts to be inferred from and interpreted by the general laws of Congress and the regulations, orders, and practice of the Post-Office Department and other attending circumstances, as in the Eastern Railroad case, before cited."

In holding that a statutory maximum was the measure of reasonable value of a carrier's service, Lord Watson, in Manchester, Sheffield, &c., Ry. Co. *vs.* Brown, L. R. 8 Appeal Cases, 715, said:

> "*Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate."

In the later case of Great Western Railway Co. *vs.* McCarthy, L. R. 12, Appeal Cases, 218, 235, referring to the earlier case, he said:

> "A rate sanctioned by act of Parliament is a legal rate, which the company can exact from all who employ them to carry, unless they have disabled themselves from making the charge by conceding terms unduly favorable to some of their customers. Until it is shown that they cannot lawfully charge the statutory rate, it must, in my opinion,

be regarded not only as lawful but as reasonable."

See also

Jenkins *vs.* National Association, 111 Georgia, 734.

Thompson *vs.* Sanborn, 52 Michigan, 141.

The distinction respecting those cases pointed out in Atchison, T. & S. F. R. Co. *vs.* United States, 225 U. S., 640, does not apply here, for there objection to the proposed terms of compensation was not made by the company until after service had been begun and when made elicited immediate reply to effect that the proposed terms would be adhered to and none others would be accepted. Here the refusal to perform service upon the terms offered was complete before the tender of the mails by the Postmaster General, which, without more said, initiated the quasi or constructive contractual relations which underlie this action between the parties.

It may be suggested that the payments already made constituted full accord and satisfaction and that claimant cannot pursue with success his present demand, even though upon the strength of the above decisions it would appear that it had not received its full deserts, but, as before said in this brief—it is elemental that in cases of money obli-

gations a larger debt is not discharged by the payment of a lesser sum, and this even though the creditor should give an acquittance in full.

United States *vs.* Bostwick, 94 U. S., 53, 67.
Fire Insurance Asso. *vs.* Wickham, 141 U. S., 564.
Murdock *vs.* District of Columbia, 22 Ct. Cl., 464, 472, aff'd.
Kiskadden *vs.* United States, 44 Ct. Cl., 205, 219.

It is respectfully submitted that the attempt on part of the Postmaster General to alter the customary rates of compensation for carrying the mails, not by contracting or attempting to contract with carriers at prices per mile per annum less than the maxima prescribed by statute and invariably applied, but by departing from the mandatory requirements of the statutes in ascertaining the average weights of mails carried per day, was futile and, in the absence of an express contract to the contrary, appellant is entitled to recover for the service which it performed compensation at the rates per mile per annum which the Congress so particularly prescribed.

The judgment of the Court of Claims is erroneous and should be reversed.

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